Supreme Court, U.S.
FILED

(1)

97 • 563 APR 15 1997

No. ——— OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

MARC FORMAN, GUY VANDERPOOL, AND WILLIAM DIX,

Petitioners,

v.

CITY OF RICHMOND, INDIANA, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

J. Scott Forgey
Attorney at Law
220 East Main Street
Muncie, Indiana 47305
Tel. (765) 747-9618

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

45 pp

QUESTION PRESENTED

Whether the finding of qualified immunity for the police officer, Lt. Mark Smith, was correct and proper in the specific facts and circumstances, as to the April 3, 1992, search and seizure of the Richmond Plaza Bingo Center, Richmond, Indiana, of the locked room under the control of Marc Forman; warrantless arrest of Marc Forman on April 20, 1993, warrantless arrest of William Dix on April 8, 1992, and the warrantless arrest of William Dix on June 6, 1993.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE SEVENTH CIRCUIT OPINION IS CONTRARY TO THE FACTS AND THE LAW WHERE THE POLICE OFFICER WAS GRANTED QUALIFIED IMMUNITY FOR HIS ACTIONS 5

CONCLUSION 9

APPENDIX A1

TABLE OF AUTHORITIES

Page

Cases

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 5

Harrison v. State, 424 N.E.2d 1065 (Ind.App. 1981) 7

Illinois v. Rodriguez, 110 S.Ct. 2793 (1990) 6, 7

Juriss v. McGowan, 957 F.2d 345 (7th Cir. 1992) 8

Malley v. Briggs, 475 U.S. 335 (1986) 7, 8, 9

Pierson v. Ray, 396 U.S. 547 (1967) 8

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 6

State v. Forman, 662 N.E.2d 929 (Ind. 1996) 3, 6

State v. Hauck, 577 N.E.2d 608 (Ind.App. 1991) .. 7, 8, 9

Statutes

28 U.S.C. 1254(1) 1

42 U.S.C. 1983 1

Other Authorities

Fourth Amendment 1, 2, 9

Fourteenth Amendment 2

PETITION FOR WRIT OF CERTIORARI

Marc Forman, et al., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on January 15, 1997, where the police officer was granted qualified immunity where the immediate facts and circumstances did not support the same.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this petition is published.

JURISDICTION

On January 15, 1997, the United States Court of Appeals for the Seventh Circuit issued an opinion in the matter, where the ruling of the United States District Court was affirmed.

On February 18, 1997, the Petitioner filed a motion to Recall Mandate and File Petition for Rehearing instanter, and that was denied in a ruling from the United States Court of Appeals for the Seventh Circuit on March 11, 1997.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. 1254(1), where the statute involved in the matter is 42 U.S.C. 1983, specifically under the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The United States District Court granted a summary judgment for the police officer, where qualified immunity was conferred upon that police officer for the actions taken by Lt. Smith as the officer in charge, which were contrary to the provisions of the Fourth and Fourteenth Amendments. It concerns a locked room, and arrests made of person.

This matter was submitted to the United States Court of Appeals for the Seventh Circuit, who affirmed that finding. The Court of Appeals held that the warrantless search and seizure of April 3, 1992, at the bingo center under the consent to search was found proper. There was no request for a key or assistance to get in the only locked room on the premises, be it from the consent giver, Luther Ogletree, or Guy Vanderpool. Lt. Smith stated he saw Vanderpool close that door when he originally entered the bingo center on that date.

Lt. Smith ordered his officers to remove the locked door by its hinges on April 3, 1992, without any conversation with either person. Each had been detained that date.

From the record in the matter, the officer relied upon the apparent authority flowing from a consent to search. It was the rationale to enter the only locked door therein.

Lt. Smith made the conscious and knowing decision to not speak to those who were in a position to readily gain access to the locked room, without dramatic actions. Those premises had been secured by Lt. Smith's officers prior to any consent to search on April 3, 1992, which took approximately three minutes in that situation.

Vanderpool provided Lt. Smith the keys after the door was forced off its hinges.

Ten (10) poker machines were found in the locked room, with no bingo supplies in that room. They were seized by Lt. Smith, notwithstanding the fact that there was no actual knowledge that (i) the machines worked, (ii) they were actually played, and (iii) there were pay-outs for their play, which made them illegal. There had been anonymous information received by Lt. Smith, where he opted not to follow through with any investigations therein before April 3, 1992, other than periodic surveillance of the premises.

Criminal charges were filed against the lessee of the locked room, Marc Forman, in state court. A Motion to Suppress was filed in the matter, which was granted. It was appealed by the State of Indiana, and went to the Supreme Court of Indiana.

The Supreme Court of Indiana concluded that Lt. Smith failed to act as a reasonable police officer in their unanimous opinion in *State of Indiana v. Marc Forman* (Ind. 1996) 662 N.E.2d 929. Their opinion recited the fact from the trial court that there was no request for a key prior to the actual order to remove the door by its hinges.

The rationale of the Seventh Circuit to confer qualified immunity on the police officers was based on no [then] prescribed duty to ask for a key. [A12]

Lt. Smith executed probable cause affidavits in June, 1992, concerning the matter, against Marc Forman and Guy Vanderpool; and William Dix in that same time period.

The charges against Marc Forman were filed on April 30, 1992, where Marc Forman was the subject of a warrantless arrest on April 20, 1993, by an officer under Lt. Smith. This local prosecutor stated that there had been an attempt to get an arrest warrant against Marc Forman. Lt. Smith provided the probable cause in that effort. Lt. Smith stated the prosecutor issued that warrantless arrest order, and the prosecutor denied issuing the order or responsibility for that action by Lt. Smith's officer.

Guy Vanderpool was charged on April 30, 1993, and arrest warrant was obtained. Probable cause was established through Lt. Smith, and Lt. Smith executed that arrest warrant on June 6, 1993, arrest of Guy Vanderpool.

William Dix was the subject of a warrantless arrest on April 8, 1992, in the process of the execution of a search warrant issued by a local court. Lt. Smith stated Dix was at the bingo center on April 3, 1992, and performed office work. Dix was instructed to leave the center on April 3, 1992, where the consent giver and Vanderpool were retained by Lt. Smith prior to the search.

Lt. Smith thereafter conducted an inquiry into an Ohio church that was issued a bingo permit by the State of Indiana in relation to the center. Those results were noted in an affidavit to support an April 8, 1992 search warrant following that inquiry. Lt. Smith did not mention William Dix in that affidavit. There were no other objective observations made of Dix by Lt. Smith.

There were credibility problems with Lt. Smith in the record, including his denial of participation in the suppression hearing in *State of Indiana v. Marc Forman*, 89 C01

9304 CF 047, in state court. In addition, the record contained the conflicting positions between Lt. Smith and the prosecutor for actions taken herein.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit Opinion Is Contrary To The Facts And The Law Where The Police Officer Was Granted Qualified Immunity For His Actions

The issues were ruled pursuant to a summary judgment. *Celotex Corp. v. Catrett*, 47 U.S. 317 (1986) held that a summary judgment is proper where there is no dispute of material fact and the party is entitled to judgment as a matter of law.

Marc Forman was the leaseholder of the locked room that held the machines, where Mr. Smith stated he was not aware of that fact until after the door was removed.

Search and seizure of the bingo center on April 3, 1992, by Lt. Smith fell under established law. The issue therein was the apparent authority of Lt. Smith, in the context of the consent to search obtained from the consent giver, notably with the locked room. Lt. Smith told the Wayne Circuit Court that he believed it was part of the area to be searched. There was no request by Lt. Smith, as the officer in charge, for a key from anyone who could have had one on April 3, 1992, be it Ogletree or Vanderpool.

The Motion to Suppress in the Forman charge challenged the actions of Lt. Smith. That state court heard the evidence from Lt. Smith, and determined that the seizure

was unreasonable. It went up the Supreme Court of Indiana, and unanimously agreed with trial court in *State of Indiana v. Marc Forman* (Ind. 1996), 662 N.E.2d 929. A pivotal fact was that Lt. Smith had the consent giver, and did not ask for a key prior to the order to remove the door by its hinges. It did not support a reasonable belief by Lt. Smith as to apparent authority over the locked room on April 3, 1992.

Illinois v. Rodriguez, 110 S.Ct. 319 (1990) had been decided in 1992, where the Supreme Court was concerned with the issue of apparent authority. From that case, it was held that where a party presents himself as having that authority, acts consistently with that apparent authority for the common control, an officer is reasonable in that belief. A key was produced and used by a third person in this case.

The Court of Appeals noted that a third party with common authority over the premises sought to be searched may provide such valid consent citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) [A12]. In the instant matter, Lt. Smith took no action to validate third party control or mutual use from the consent giver on April 3, 1992. It was patently unreasonable in the [then] immediate situation.

A less dramatic means to gain entry to the locked room was available to Lt. Smith, which was not exercised by simply asking for a key, as well as being reasonable. The problem was exacerbated by the fact that there was a seizure without the probable cause or the concrete facts that the machines were, in fact, illegal. There were only

the anonymous complaints, which were never investigated by Lt. Smith before April 3, 1992.

The actions were illegal and contrary to the Fourth Amendment. *Rodriguez* set a standard to judge whether there was reasonable apparent authority, and Lt. Smith did not act within those parameters. The search was patently unreasonable under the Fourth Amendment. A conflict exists between the Court of Appeals and established law.

A warrantless arrest was made by a subordinate officer of Lt. Smith against Marc Forman. That was subject to probable cause, which was subject to the standard of objective reasonableness. [*Harrison v. State* (Ind.App. 1981), 424 N.E.2d 1065; *State v. Hauck* (Ind.App. 1991), 577 N.E.2d 608, reh. den.; *Malley v. Briggs*, 475 U.S. 335 (1986)] Facts of April 3, 1992, did not support probable cause to arrest.

Marc Forman was arrested by a subordinate officer of Lt. Smith on April 20, 1993, and formal criminal charges were filed on April 30, 1993. They flowed from the events of April 3, 1992, at the bingo center. Vanderpool was also charged for that.

The position of the Court of Appeals was that Lt. Smith did not participate in the actual arrest, as stated in their opinion. [A17] In this matter, the record contained the conflicting information from Lt. Smith and the prosecutor, where Lt. Smith stated it was done on the orders of the prosecutor, while the prosecutor denied [then] contemporaneous knowledge or responsibility for that warrantless arrest. They stated it under the penalty of perjury. A genuine dispute of material fact was resolved

against Forman, contrary to law, creating a conflict in the matter to be resolved at a trial.

Guy Vanderpool was the subject of a warrant arrest on June 6, 1993. Lt. Smith was used to establish the probable cause for the arrest warrant, the affiant for the probable cause affidavit executed in June, 1992, and executed the arrest warrant against Guy Vanderpool.

Pierson v. Ray, 396 U.S. 547, 557 (1967) held that a police officer did not have absolute immunity in the application of a warrant, rather qualified immunity.

Juriss v. McGowan (7th Cir. 1992), 957 F.2d 345, held that there was no qualified immunity where the officer knew his information was false in the process of securing a warrant.

The record was replete with facts to establish that Lt. Smith knew his information

There was the warrantless arrest of William Dix on April 8, 1992. Under *Malley*, an objective standard was applicable on that date. The actual arrest was made by Lt. Smith's officers, under his authority in the process of executing a search warrant. It did not vitiate the probable cause requirement under *Hauck*.

From the record, Lt. Smith made observations of William Dix on April 3, 1992, in the bingo center office, where he was a functionary, Lt. Smith told William Dix to leave the bingo center on April 3, 1992, while others were retained on the premises. Lt. Smith's inquiry regarding the Ohio church did not yield additional information to

implicate Dix in illegal activity on April 8, 1992, to support the arrest. The arrest was predicated on his presence at a specific place and time by Lt. Smith.

It was an arbitrary and capricious action of Lt. Smith, not supported by the facts of the law, all contrary to *Malley, Hauck, and* the Fourth Amendment.

Dix faced criminal charges flowing from events of April 3, 1992, at the bingo center, and was not charged after the April 8, 1992, arrest. The probable cause affidavit executed by Lt. Smith in June, 1992, noted the events of April 3, 1992.

CONCLUSION

Conflicts are apparent in the matter, including their analysis of facts of the search and seizure in the instant matter and analogous cases. [A14] The Court of Appeals failed to apply the facts to the laws for their results. Certiorari is appropriate in the matter to resolve the conflicts presented by the Court of Appeals.

Respectfully submitted,

THOMAS D. MARGOLIS
Attorney at Law
409 West Washington Street
Muncie, Indiana 47305
Tel. (317) 288-0600
Attorney for Petitioner

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-2091

MARC FORMAN, WILLIAM DIX, JR., and GUY VANDERPOOL,

Plaintiffs-Appellants,

v.

RICHMOND POLICE DEPARTMENT and MARK SMITH, Lieutenant, Individually and as officer with the Richmond Police Department,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 94 C 840 – **Larry J. McKinney,** *Judge.*

ARGUED OCTOBER 28, 1996 – DECIDED JANUARY 15, 1997

Before HARLINGTON WOOD, JR., RIPPLE, and KANNE, *Circuit Judges.*

KANNE, *Circuit Judge.* This case arises from a police raid of an unlicensed bingo operation in Richmond, Indiana. After determining that the bingo game was being conducted in violation of Indiana law, Lt. Mark Smith of the Richmond Police Department obtained written consent to search the Richmond Plaza Bingo Center ("Bingo

Center") from the operator of the bingo game, who was also the leaseholder of the premises. While conducting their warrantless, yet consensual search, Richmond police officers entered a locked room on the premises by removing its door from the hinges. Inside that room, the officers discovered ten video gambling machines that were allegedly being operated in an illegal manner. Marc Forman admitted that he was the lessee of that room and the owner of the gambling machines.

As a result of this search and further investigation of the bingo operation and the gambling machines, the police eventually arrested Marc Forman, William Dix, Jr., and Guy Vanderpool, charging them with various counts of professional gambling. The State, however, dropped its charges against Forman after an Indiana state trial court granted Forman's motion to suppress the evidence – *i.e.*, the gambling machines and related materials – recovered during the search of the locked room at the Bingo Center. The State also dropped the charges against Vanderpool. Dix's case, however, proceeded to trial where he was convicted on professional gambling and theft charges.

Forman, Dix, and Vanderpool subsequently filed a complaint in the United States District Court for the Southern District of Indiana alleging that Lt. Smith, the Richmond Police Department, and others violated a number of their federal and state constitutional rights, as well as various state laws. This appeal is primarily concerned with their 42 U.S.C. § 1983 claims contending that Lt. Smith and the Police Department violated their Fourth and Fourteenth Amendment rights while conducting

their warrantless search of the Bingo Center and in effectuating their subsequent arrests. Because we find Appellants' claims to be without merit, we affirm the decision of the district court granting summary judgment in favor of Appellees.

I. History

On April 3, 1992, Lt. Mark Smith – an investigator with the Special Investigations Unit and a seventeen-year veteran of the Richmond Police Department – received information that the Bingo Center had been operating without a valid bingo permit. Max Pratt, the President of the Muncie Fraternal Order of Police ("FOP"), told Lt. Smith that the Bingo Center had been using the FOP's charity bingo permit without the FOP's authorization. Pratt also informed Lt. Smith that earlier in the day he had removed a copy of that permit from the Bingo Center, that the Bingo Center continued to conduct its bingo operation, and that he was unaware of another bingo license on the premises.

Lt. Smith went to the Bingo Center that night in order to determine the validity of Pratt's claim. When Lt. Smith arrived at the Bingo Center, he observed Guy Vanderpool shut an open door at the rear of the parlor. Lt. Smith then spoke with Vanderpool who introduced Lt. Smith to Luther Ogletree, the person in charge of the Bingo Center. Ogletree told Lt. Smith that he was the operator of the bingo game and the lessor of the premises. The two men then went into an office in the rear of the building to discuss the Bingo Center's operating permit. Upon entering the office, Lt. Smith saw William Dix, Jr. and Bertha

Ogletree counting money from that night's bingo operations.

After searching the office with Dix and Bertha Ogletree, Luther Ogletree was unable to produce a valid bingo permit. Lt. Smith subsequently informed Ogletree that the Bingo Center was operating illegally and that he would have to stop the game. Lt. Smith called for additional police officers to help him shut down the operation.

Lt. Smith also called the Wayne County Prosecutor, Terry O'Maley, to discuss whether the police needed a warrant to search the premises. O'Maley told Lt. Smith that they would not need a search warrant if they obtained valid consent to search the building.

Next, Lt. Smith obtained a standard Richmond Police Department Consent to Search form and read its contents to Ogletree. Ogletree stated that he understood the form, and then he signed it. Lt. Smith and other officers began searching the office and other areas of the building. In the office, the police found several thousand dollars in cash, the Bingo Center's operating records, and a handgun. When searching the rest of the building, the police encountered a locked room at the rear of the Bingo Center. Lt. Smith had seen Vanderpool close the door to this room when he first arrived at the bingo parlor that evening. The police did not ask Ogletree, Vanderpool, or anyone else if they had a key for the room; instead, they removed the door from its hinges. Ogletree was present when the police removed the door, but he did not ask the police to stop their search, nor did he otherwise attempt to withdraw or qualify his written consent to search.

Inside that room, police officers discovered ten video gambling machines and ten stools. The room did not contain any bingo supplies. Ogletree told Lt. Smith that the machines belonged to Marc Forman and provided a copy of his lease agreement with Forman. Vanderpool then informed Lt. Smith that he worked as a volunteer at the Bingo Center under Ogletree's supervision, and he gave Lt. Smith keys to both the room and the machines.

At that time, Lt. Smith once again contacted O'Maley to determine what steps to take in regard to the video gambling machines. Pursuant to O'Maley's advice, Lt. Smith confiscated the currency, the gambling machines, and the bingo operation records. No individuals were arrested that night at the Bingo Center. Later that night, Forman called Lt. Smith and claimed ownership of the gambling machines.

Three days later, Ogletree provided Lt. Smith with a bingo permit issued to the New Hope Missionary Baptist Church ("New Hope Church") of Dayton, Ohio. The next day, Richmond police officers went to the address in Dayton, Ohio but found no church there. Lt. Smith further investigated the New Hope Church permit by contacting the Indiana Secretary of State's Office. That office informed Lt. Smith that it never issued a valid charity gaming permit to the New Hope Church. Lt. Smith subsequently presented these findings, via an affidavit, to the Wayne County Superior Court and obtained a warrant to search the Bingo Center. Several Richmond police officers executed this warrant on April 8, 1992.

On April 8, 1992, Richmond police officers arrested Dix (as well as Bertha and Luther Ogletree) on charges of

professional gambling. Those charges were based on Dix's activities at the Bingo Center during the first, warrantless search of the premises on April 3, 1992. O'Maley prepared, and Lt. Smith signed an Affidavit of Probable Cause against Dix on June 30, 1992. This Affidavit and an Information charging Dix with committing Professional Gambling and Theft – two class D felonies – were filed on September 22, 1992. The State filed no charges against Dix arising out of the April 8, 1992 search of the Bingo Center. The Wayne County Superior Court denied Dix's subsequent motions to dismiss the charges and to suppress the evidence taken during the April 3, 1992 search. Ultimately, a jury convicted Dix of both charges, and the Indiana Court of Appeals affirmed Dix's conviction.

On June 29, 1992, approximately two and a half months after the seizure of the video gambling machines, Lt. Smith signed an Affidavit of Probable Cause regarding Forman based on Forman's admitted knowledge and ownership of the machines. The Affidavit alleged that the police had probable cause to believe that Forman committed two counts of Professional Gambling on April 3, 1992.

The Richmond Police Department, however, took no further action against Forman until April 20, 1993. On that day, police officers made a warrantless arrest of Forman in the hallway of the Wayne County Courthouse. The previously executed Affidavit of Probable Cause and an Information charging Forman with two counts of professional gambling were filed with the Wayne County Circuit Court on April 30, 1993.

On May 4, 1993, Forman filed a motion to suppress the evidence seized from the locked room at the Bingo

Center. The court granted Forman's motion noting that the officers should have asked the consenting party to unlock the door to the room before removing it from its hinges. The Wayne County Prosecutor's office subsequently dismissed the charges against Forman stating "the Court's ruling on the Defendant's Motion to Suppress precludes further prosecution." On April 12, 1995, an Indiana appellate court reversed the trial court's ruling on the Motion to Suppress. *See State v. Foreman*, 649 N.E.2d 120 (Ind. Ct. App. 1995). That court held, as a matter of law, that the Richmond Police Department reasonably believed that Ogletree possessed common authority over the room leased to Forman, and as such, Ogletree's consent to search extended to that room. *Id.* at 125. The Supreme Court of Indiana, however, reversed the court of appeals and ruled that regardless of whether Ogletree had common authority over the locked room, there was sufficient evidence that Ogletree did not consent to the search of that room. *State v. Foreman*, 662 N.E.2d 929, 932 (Ind. 1996). In support of this position, the court reasoned that if the police reasonably believed that Ogletree consented to the search of the room they would have simply asked him to unlock the door rather than removing it from its hinges. *Id.*

On June 29, 1992, Lt. Smith also executed an Affidavit of Probable Cause relating to Vanderpool maintaining that he had probable cause to believe that Vanderpool committed two counts of Professional Gambling. The Affidavit was based on Lt. Smith's observations on April 3, 1992 and further police investigation, which revealed that Vanderpool helped Forman bring the video gambling machines into the building, he supervised customer use

of the machines, and he provided the customers with their winnings or "payout" from the machines. On April 30, 1993, O'Maley filed this Affidavit and an Information against Vanderpool. Ten days later, the Wayne County Superior Court issued an arrest warrant for Vanderpool; Lt. Smith arrested Vanderpool on June 2, 1993. On May 9, 1994, however, O'Maley filed a motion to dismiss the charges against Vanderpool stating that the case did not merit further prosecution.

In their Amended Complaint, Forman, Dix, and Vanderpool contended that Lt. Smith, the Richmond Police Department, and others violated 42 U.S.C. §§ 1983 and 1985 by depriving them of their rights under the United States Constitution, the Indiana Constitution, and various statutory provisions. All three plaintiffs also brought false arrest and false imprisonment claims, and Dix added a claim for defamation.

The parties filed cross motions for summary judgment in January and February of 1995. The district court granted Lt. Smith's and the Richmond Police Department's motion and denied plaintiffs' motion. With regard to the claims against Lt. Smith, the court held that Lt. Smith either did not violate the plaintiffs' constitutional rights or that he was entitled to qualified immunity for any constitutional or state law violations that did occur. Next, the court found that plaintiffs failed to establish that the Richmond Police Department violated their constitutional rights through some official policy or custom. Finally, the court ruled in favor of the unnamed police officers ("John Does 1-50") because plaintiffs failed to identify them within the applicable two-year statute of limitations. The court also noted that these defendants

would be entitled to the same qualified immunity as Lt. Smith. Forman, Dix, and Vanderpool subsequently brought this appeal.

II. Analysis

The only issues Forman, Dix, and Vanderpool properly preserved for appeal are whether Lt. Smith, the Richmond Police Department, or any other officers from the department violated 42 U.S.C. § 1983 by depriving them of their constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution.[1]

---

[1] Forman, Dix, and Vanderpool waived various claims put forth in their district court complaint and presented in the summary judgment motions – *i.e.*, their 42 U.S.C. § 1985 claims, as well as their state claims for false arrest, false imprisonment, and defamation – because they failed to argue those issues in their appellate brief. *See United States v. Linnear*, 40 F.3d 215, 222 (7th Cir. 1994); *Gabriel v. United States*, 30 F.3d 75, 77 (7th Cir. 1994); *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 697 (7th Cir. 1991). To the extent that Appellants preserved any § 1983 claims against the Richmond Police Department as an individual entity or against any "unnamed officers" from that department as "John Does," those contentions are discussed below in section C.

We also note that Wayne County Prosecutor Terry O'Maley is not a party to this appeal despite the discussion of the claims against O'Maley in Appellants' brief. The district court dismissed the claims against O'Maley in an order dated October 6, 1995. The Notice of Appeal and the Docketing Statement that Appellants filed with this court address only the district court's April 1, 1996 summary judgment determination. Neither document challenges the district court's October 6, 1995 order dismissing O'Maley.

A. Standard of Review

We utilize a *de novo* standard of review in analyzing a district court's grant of summary judgment, *Campbell v. Towse*, 99 F.3d 820, 826 (7th Cir. 1996), and its determination of a law enforcement officer's entitlement to qualified immunity, *Jones by Jones v. Webb*, 45 F.3d 178, 183 (7th Cir. 1995).

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the party opposing the motion and draw all justifiable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255

Moreover, Appellants' counsel was aware of the confusion regarding O'Maley's status in the appeal. Upon receiving Appellants' brief, which did not include O'Maley as a named party, the Indiana Attorney General's office telephoned the clerk of this court in order to determine O'Maley's status. We informed the Indiana Attorney General's office that O'Maley was not a party to this appeal. In a letter dated July 26, 1996, the Indiana Attorney General's office informed Appellants' counsel that O'Maley was not a party to the appeal and that, accordingly, he would not file an appellate brief. Appellants' counsel made no further efforts to ensure that he properly appealed the district court's order dismissing the O'Maley claims. As such, we will not entertain Appellant's claims against O'Maley.

(1986). However, neither "the mere existence of *some* alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, nor the demonstration of "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), will sufficiently demonstrate a genuine issue of material fact. In that regard, the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252.

B. Forman's, Dix's, and Vanderpool's § 1983 Claims Against Lt. Smith

The resolution of the § 1983 claims against Lt. Smith primarily depends upon whether Lt. Smith was entitled to qualified immunity for his actions in the investigation of the alleged illegal activities at the Bingo Center, and the subsequent arrest of those allegedly involved in these activities. Qualified immunity is generally a question of law for the court to resolve, *Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir. 1988), "at the earliest possible stage in litigation," *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). As such, summary judgment provides a proper posture from which to decide this objective legal question, which we review *de novo*. *Rakovich*, 850 F.2d at 1204-05.

Government officials may raise qualified immunity as an affirmative defense to actions brought against them under 42 U.S.C. § 1983. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that "government officials performing discretionary functions generally are shielded from

liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. *Harlow* thus announced an objective standard for determining whether a government officer is entitled to qualified immunity. *Id.* at 816-19. In that regard, a "law enforcement officer who participates in a search that violates the Fourth Amendment may [not] be held personally liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment." *Anderson v. Creighton*, 483 U.S. 635, 636-37 (1987).

In this circuit, we have outlined a two-step approach for analyzing a defendant's qualified immunity defense: "(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question?" *Kernats v. O'Sullivan*, 35 F.3d 1171, 1176 (7th Cir. 1994) (citing *Siegert v. Gilley*, 500 U.S. 226, 231-32 (1991)); *see also Siegert*, 500 U.S. at 232 ("A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all."). A negative answer to either prong of this test will decide the matter. *Montville v. Lewis*, 87 F.3d 900, 902 (7th Cir. 1996).

Once a defendant has raised a qualified immunity defense, the plaintiff bears the burden of demonstrating the violation of a clearly established right. *Kernats*, 35 F.3d at 1176 (citing *Rakovich*, 850 F.2d at 1209). To demonstrate that a right is "clearly established," plaintiffs need

not show that "the very action in question" was previously held unlawful, *Anderson*, 483 U.S. at 640, or that a prior case is "on all fours" with the facts and the law in their own case, *Landstrom v. Illinois Dep't of Children & Family Servs.*, 892 F.2d 670, 676 (7th Cir. 1990). Instead, "[c]losely analogous cases, those decided before the defendants acted or failed to act, are required to find that a constitutional right is clearly established." *Rakovich*, 850 F.2d at 1209 (quoting *Powers v. Lightner*, 820 F.2d 818, 821 (7th Cir. 1987)).

A key determination in this analysis is the level of generality for courts to apply in identifying which legal rights are clearly established. *See Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996). "[T]he Supreme Court cautioned against imposing an unrealistic burden on public officials" in conducting this analysis. *Id.* (citing *Anderson*, 483 U.S. at 639). Requiring too much hesitation from our public officials would impair the purpose of qualified immunity, which is to give " 'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter*, 502 U.S. at 229 (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)). An "accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.* (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984)). As such, a "clearly established" right must be sufficiently clear so that a reasonable officer would understand that he is violating that right. *Anderson*, 483 U.S. at 640.

1. Forman's Claims.

Forman raises two § 1983 claims against Lt. Smith. First, he alleges that Smith violated his Fourth Amendment right against unreasonable searches and seizures by conducting a warrantless search of the locked room in the Bingo Center and seizing the ten gambling machines found inside. Second, Forman claims that Smith violated his constitutional rights by either ordering or participating in his warrantless arrest on April 20, 1993.

In regard to Forman's unreasonable search and seizure claim, it makes sense to initially analyze the second prong of the qualified immunity test – *i.e.*, whether there were clearly established constitutional standards governing the warrantless search of the locked room – in order to avoid addressing the more difficult question of whether the warrantless search was in fact unconstitutional. *See Montville*, 87 F.3d at 902 ("At times it makes sense to address the second prong at the outset.") Thus, we must determine whether Lt. Smith could have reasonably believed that the search of the locked room was lawful in light of the factual scenario and the clearly established law on April 3, 1992.

An examination of the precedent available in April 1992 regarding the scope of consent searches reveals that the constitutional standards governing the consensual search in this case were not clearly established. Specifically, it was not clear from the established Fourth Amendment precedent that Lt. Smith was required to ask the consent giver (Ogletree) for a key to unlock the room containing the video gambling machines.

By April 1992, it was plainly clear that the Fourth Amendment's general prohibition against the warrantless search of a person's property did not apply when the "search [is] conducted pursuant to a valid consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). A third party with common authority over the premises sought to be searched may provide such valid consent. *United States v. Matlock*, 415 U.S. 164, 171 (1974). Moreover, a warrantless search was "valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises" even if that third party did not possess such authority. *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990); *see also Myers v. State*, 564 N.E.2d 287, 290 (Ind. Ct. App. 1990) (finding it "eminently reasonable" for an officer to search defendant's "company car" based upon the consent given by defendant's employer – who was the registered owner of the vehicle – because the officer was unaware that defendant had exclusive possession and control of the car).

The Supreme Court had also addressed situations involving the scope of warrantless searches. In *United States v. Ross*, 456 U.S. 798 (1982), for example, the Court held that a "lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." *Id.* at 820-21. The Court maintained that when "a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers . . . must give way to the interest in the prompt and

efficient completion of the task at hand." *Id.* at 821; *see also Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (finding no Fourth Amendment violation where defendant consented to the search of his car and the police found cocaine in a closed paper bag found on the floor of the car). In *Jimeno*, however, the Court added in *dicta* that it was "very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk." *Jimeno*, 500 U.S. at 251-52.

Before April 3, 1992, this court and the Indiana courts had similarly considered cases involving the scope of consent searches, often finding that the consent to search a room or a container permitted officers to search other rooms or containers within the permitted areas. *See, e.g., United States v. Lechuga*, 925 F.2d 1035, 1042-43 (7th Cir. 1991) (finding that a defendant's consent to search an apartment extended to the search of a suitcase within a closet in the apartment); *United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986) (finding that defendant's consent to search a piece of luggage extended to a sealed box within the luggage); *Heald v. State*, 492 N.E.2d 671, 680 (Ind. 1986) (finding that a person's consent to search a handbag operated as a consent to search items, such as a letter inside an unsealed envelope, found within the handbag); *but cf. United States v. Garcia*, 897 F.2d 1413, 1419-20 (7th Cir. 1990) (noting that the "opening of [a car's] door panels is not normally included in [the] set of areas to be searched" and "inherently invasive," but ultimately holding that the dismantling of the doors was justified by probable cause); *United States v. Rodriguez*,

888 F.2d 519, 523-25 (7th Cir. 1989) (finding that defendant's wife's consent to search a room did not necessarily include consent to search closed containers within that room unless the wife had apparent authority to consent to the opening of those closed containers).

The most analogous set of facts we could find involved a Fifth Circuit case in which police officers, after obtaining oral consent to search a house, used a sledgehammer to knock out boards covering the entrance to the house's attic. This opening was in the ceiling of a bedroom closet, and it provided the only means of access to the attic. In its original decision, a split Fifth Circuit panel found the police action to be reasonable. *United States v. Ibarra*, 948 F.2d 903, 907 (5th Cir. 1991) (*Ibarra I*). Relying upon the Supreme Court's decisions in *Rodriguez*, *Jimeno*, and *Ross*, the panel's majority found that the defendant "having consented to a limitless search of the house, relinquished his expectation of privacy in the attic, and because other means of access were unavailable," the police conduct was reasonable. *Id.* Upon rehearing en banc, however, the Fifth Circuit was equally divided (7-7) on whether the police violated the defendant's Fourth Amendment rights, and thus the court affirmed the district court's order suppressing the evidence. *United States v. Ibarra*, 965 F.2d 1354, 1354 (5th Cir. 1992) (*Ibarra II*).

Based on these precedents it was not at all clear in April 1992 that Lt. Smith was required to ask for a key to the locked room *within the Bingo Center* after Ogletree had already provided his written consent to search the entire building. Neither party has presented us with a case setting forth a rule stating that a consent to search either

does or does not encompass locked rooms on the premises consented to be searched. If anything, the caselaw detailed above (especially the Fifth Circuit's original *Ibarra I* decision, which was decided in November 1991 – less than one year before the search here) demonstrates that in April 1992, Lt. Smith may not have needed to seek further consent to search the locked room in the Bingo Center.

Perhaps the best indication that the standards governing this consent search were not clearly established is the fact that two Indiana appellate courts could not agree on whether it was objectively reasonable for Lt. Smith to believe that Ogletree had consented to the search of the locked room. *Compare Foreman*, 649 N.E.2d at 125 (ruling that it was objectively reasonable, as a matter of law, for the police to determine that Ogletree possessed common authority over the premises and thereby consented to the search of the locked room) *with Foreman*, 662 N.E.2d at 932 (finding that the consent to search did not extend to the locked room regardless of whether Ogletree possessed common authority over that room). The Fifth Circuit's split decision in *Ibarra I*, as well as its inability to reach a majority in *Ibarra II*, similarly suggest that there was no "clearly established" precedent for Lt. Smith to follow regarding the search of the locked room in the Bingo Center.[2]

---

[2] Although the en banc decision was handed down on June 30, 1992, almost three months after the search of the Bingo Center, the Fifth Circuit's inability to reach a consensus provides strong evidence that the Fourth Amendment caselaw regarding the scope of consent searches was not clearly established three months earlier on April 3, 1992.

Moreover, the specific facts confronted by Lt. Smith bear out the reasonableness of his actions in light of the law. Upon entering the Bingo Center, Lt. Smith noticed Vanderpool closing the door to the locked room. Vanderpool then directed Lt. Smith to Ogletree who identified himself as the operator of the Bingo Center and the leaseholder of the premises. Ogletree did not inform Lt. Smith that Forman was the lessee of the locked room until after the police discovered the gaming machines. Based on this information alone, it was objectively reasonable for Lt. Smith to believe that Ogletree possessed at least common authority, if not sole authority, over the entire Bingo Center.

Lt. Smith's decision to seek the advice of O'Maley, the county prosecutor, similarly supports his defense. After determining that the bingo game was being operated without a valid permit, Lt. Smith sought O'Maley's advice regarding the procedures he should take in closing down the game and searching the premises. O'Maley instructed Lt. Smith to obtain a consent to search the premises. Lt. Smith followed this advice and he obtained Ogletree's written and oral consent to search the building. While Lt. Smith's reliance on O'Maley's advice to seek the consent to search, as opposed to obtaining a search warrant, does not alone satisfy Lt. Smith's burden of acting reasonably, it does provide evidence of his good faith and objective reasonableness. *See Lucero v. Hart*, 915 F.2d 1367, 1371 (9th Cir. 1990); *Tubbesing v. Arnold*, 742 F.2d 401, 407 (8th Cir. 1984).

Finally, throughout the police officers' search of the Bingo Center, Ogletree never attempted to limit or qualify his consent to search in any way. "[W]here a suspect does

not withdraw his valid consent to a search for illegal substances before they are discovered, the consent remains valid and the substances are admissible as evidence." *Dyer*, 784 F.2d at 816; *accord United States v. Berke*, 930 F.2d 1219, 1223 (7th Cir. 1991). Had Ogletree wanted to prevent the police from searching the locked room, he could have easily presented the Forman lease and stated that only Forman could consent to the search of that room. Instead, Ogletree silently observed the police remove the door from its hinges. Ogletree disclaimed control of the room only after the gambling machines were discovered.

Although we find that Lt. Smith is entitled to qualified immunity, we do not dismiss the Indiana Supreme Court's concern about police officers removing a door from its hinges when they could have easily asked someone to unlock the door. Nonetheless, there was no clearly established precedent holding that the failure to seek a key for a locked room found on premises that could otherwise be lawfully searched would result in a violation of anyone's Fourth Amendment rights. As such, we find that the district court correctly determined that Lt. Smith was entitled to qualified immunity.[3]

---

[3] In passing, Forman argues that Ogletree's consent to search was somehow involuntary, and the fact that it took Ogletree only three minutes to sign the consent to search form demonstrates the presence of police coercion. This court, however, has held that the mere fact that a defendant was surrounded by a number of police officers or was placed in handcuffs does not render his consent to search involuntary. *See United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983). The scant evidence of coercion alleged here – *i.e.*, the three minutes it took

We also reject Forman's claim that Lt. Smith violated his constitutional rights by ordering or participating in his warrantless arrest. Both sides dispute whether Lt. Smith had any involvement in Forman's warrantless arrest. If Lt. Smith did not participate in the alleged constitutional deprivation, he obviously cannot be held liable under § 1983. *See Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983). We need not discuss whether there was a genuine issue of material fact as to Lt. Smith's participation in the arrest, however, because we find that Lt. Smith was entitled to qualified immunity for any action he may have conducted in relation to the arrest.

Lt. Smith is entitled to qualified immunity if he "could have believed [Forman's arrest] to be lawful, in light of clearly established law and the information [he] possessed." *Hunter*, 502 U.S. at 227 (quoting *Anderson*, 483 U.S. at 641); *Edwards v. Cabrera*, 58 F.3d 290, 292 (7th Cir. 1995). We must therefore decide whether it was objectively reasonable for Lt. Smith to believe that there was probable cause to arrest Forman, in light of the information available to him at the time of Forman's arrest. *Hunter*, 502 U.S. at 227-28; *Edwards*, 58 F.3d at 292-93.

Indiana Code § 35-33-1 provides that a law enforcement officer may arrest someone when the officer has "probable cause to believe the person has committed or attempted to commit, or is committing or attempting to commit, a felony." An officer has probable cause to make

---

for Ogletree to sign the consent to search form – does not even approach the alleged evidence of coercion in *Janik* which we ultimately found to be constitutionally unobjectionable.

a warrantless arrest when "the facts and circumstances known to the officer would warrant a [person] of reasonable caution to believe that the accused has committed the criminal act in question." *Roberts v. State*, 599 N.E.2d 595, 598 (Ind. 1992); *see also Hunter*, 502 U.S. at 228 ("Probable cause existed if 'at the moment the arrest was made . . . the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing' " that the accused committed the crime.) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

At the time of Forman's arrest on April 20, 1993, Lt. Smith had probable cause to believe that Forman had committed a crime. The Affidavit of Probable Cause regarding Forman, sworn by Lt. Smith on June 29, 1992, details Lt. Smith's knowledge of the evidence against Forman: Lt. Smith observed the video gambling machines in the Bingo Center on April 3, 1992; he examined those "slot" machines in order to determine how they operated; and he subsequently received information that Forman was the owner of the machines, that Forman brought the machines to the Bingo Center, that Forman was the lessee of the room containing the machines, and that Vanderpool made payouts from the machines to customers. Lt. Smith was also aware that on April 6, 1993, Forman confirmed "that those machines were his and that he placed them there in the Richmond Plaza Bingo Center for profit." The Wayne County Prosecutor's office subsequently filed this Affidavit with the Wayne County Circuit Court, and that same court found that there was probable cause to arrest Forman on two counts of professional gambling.

The fact that the prosecutor (O'Maley) later determined that there was insufficient probable cause for Forman's arrest, and thus dropped the charges against Forman, does not affect Lt. Smith's entitlement to qualified immunity. The relevant inquiry is whether Smith acted objectively reasonable in light of the facts and law known to him at the time of Forman's arrest – not upon subsequent legal analysis.

We similarly reject Forman's assertion that the delay between the April 3, 1992 search of the Bingo Center and his April 20, 1993 arrest somehow violated his constitutional rights. There is no requirement that police officers must arrest an offender as soon as probable cause for the arrest exists. *United States v. Reis*, 906 F.2d 284, 289 (7th Cir. 1990) (citing *Hoffa v. United States*, 385 U.S. 293, 310 (1966)). Although it may have been better practice by the Richmond Police Department to obtain an arrest warrant, the preexisting probable cause to arrest Forman was not diminished by the mere passage of time. *See Andrews v. State*, 588 N.E.2d 1298, 1303 (Ind. Ct. App. 1992); *see also Plowman v. State*, 604 N.E.2d 1219, 1221 (Ind. Ct. App. 1992) (finding no constitutional violation for the thirty-month delay between defendant's alleged criminal conduct and his arrest because the defendant failed to demonstrate that undue prejudice resulted from the delay).

2. *Dix's Claims.*

In his cryptic brief, Dix apparently claims that his Fourth and Fourteenth Amendment rights were violated because 1) Lt. Smith conducted an investigation that did not adequately demonstrate the probable cause needed

for the April 8, 1992 search warrant of the Bingo Center, and 2) Dix's subsequent arrest was incidental to this alleged "constitutionally infirm" search.[4]

The crux of Dix's first claim seems to be that Lt. Smith and the police department did not conduct a thorough enough investigation of the New Hope Church for there to be probable cause for a search warrant of the Bingo Center on April 8, 1992. Specifically, Dix asserts that Lt. Smith and the police should have checked the church's status with the Internal Revenue Service and the Ohio Secretary of State's office.

Dix, however, conveniently ignores our consistent holding that "once police officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence." *Eversole v. Steele*, 59 F.3d 710, 718 (7th Cir. 1995); *Garcia v. City of Chicago*, 24 F.3d 966, 970 (7th Cir. 1994),

---

[4] Like the district court and Lt. Smith, we found it truly challenging to figure out exactly what Dix was attempting to claim in his brief. We note, however, that if Dix intended to assert any constitutional violations based on Lt. Smith's actions on April 3, 1992, he might be barred from bringing those claims. Because Dix was convicted based on his April 3, 1992 conduct, he could not recover damages pursuant to § 1983 if his claims "would *necessarily* undermine the validity of his conviction[s]." *Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 104 (1996). In that case, Dix could bring his § 1983 claims only after proving that his convictions were "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey*, 114 S.Ct. 2364, 2372 (1994).

cert. denied, 115 S. Ct. 1313 (1995); *Schertz v. Waupaca County*, 875 F.2d 578, 583 (7th Cir. 1989). Based on the information Lt. Smith uncovered from April 3 through April 8, he concluded that the New Hope Church had not met Indiana's requirements for a bingo permit. Lt. Smith determined that the Bingo Center was operating without a valid permit, and therefore, the game was being conducted in violation of Indiana law. Because Lt. Smith reasonably believed that the game violated Indiana law, he had sufficient probable cause to support the April 8, 1992 search warrant.

There is similarly no merit in Dix's claim that his warrantless arrest was unconstitutional. Because Lt. Smith had probable cause to support the April 8, 1992 search warrant, there can be no merit to Dix's "fruit of the poisonous tree"-type of claim that his arrest, which was incidental to the search, was unconstitutional.

Moreover, Lt. Smith had probable cause to arrest Dix based on his investigation of the bingo licenses and his observations of Dix on both April 3 and April 8. As explained above, probable cause for a warrantless arrest exists when "the facts and circumstances known to the officer would warrant a man of reasonable caution to believe that the accused has committed the criminal act in question." *Roberts*, 599 N.E.2d at 598; *see Hunter*, 502 U.S. at 228. On April 3, 1992, the bingo game was being operated without a proper charity bingo permit, and thus in violation of Indiana law. Dix was one of the people in the Bingo Center office counting the proceeds and making records of that night's bingo game. Based on this information, Lt. Smith could conclude that Dix, as a bingo game worker, violated Indiana law on April 3, 1992.

A problem arises, however, because Dix was arrested on April 8, 1992. On that night, Lt. Smith again believed that the Bingo Center was operating without a valid permit and thus in violation of Indiana law. While executing the search warrant at the Bingo Center on April 8, 1992, Lt. Smith again saw Dix at the Bingo Center. Based upon his earlier observations of Dix on April 3, 1992, Lt. Smith could reasonably conclude that Dix was engaged in similar illegal activities that night. As such, it was objectively reasonable for Lt. Smith to believe that he had probable cause to arrest Dix based on Dix's April 3, 1992 actions, or incidental to the April 8, 1992 search.

Finally, even if there was a genuine issue of material fact regarding whether Lt. Smith had probable cause to arrest Dix, Lt. Smith was clearly entitled to qualified immunity. Lt. Smith's actions were reasonably based upon the facts and law available to him at the time – on both nights, he reasonably believed that the bingo game was operating without a valid permit and on at least one occasion, he saw Dix actively participating in the operation of the game. As such, we find Dix's claims to be without merit.

3. Vanderpool's Claims.

Unlike the arrests of Forman and Dix, Vanderpool was arrested pursuant to a warrant, which the Wayne County Superior Court issued on May 10, 1993. In his § 1983 claim against Lt. Smith, Vanderpool asserts that his June 3, 1993 arrest was in violation of his constitutional rights because there was no probable cause for the arrest warrant or the execution of that warrant. Vanderpool

appears to present two arguments in support of his insufficient probable cause claims: 1) that Lt. Smith knew or should have known that the April 3, 1992 search of the Bingo Center was unreasonable, and 2) that Lt. Smith committed fraud upon the trial court in obtaining Vanderpool's arrest warrant.

In regard to the April 3, 1992 search, we have already determined that Lt. Smith was entitled to qualified immunity because his actions in searching the locked room and seizing the video gambling machines *were objectively reasonable* in light of the facts and law then available to him. Lt. Smith, therefore, *did not know, nor could he have known* that the April 3, 1993 search was *unreasonable*.

In his second argument, Vanderpool challenges the veracity of Lt. Smith's affidavit petitioning for an arrest warrant from the Wayne County Superior Court. In making this argument, Vanderpool bears the high burden of demonstrating that we should not attribute "great deference" to the magistrate's decision that a warrant should issue. *United States v. Leon*, 468 U.S. 897, 914 (1984). In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court put forth the standard for voiding a search warrant due to intentionally or recklessly provided information:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that

> hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided. . . .

Id. at 155-56; *see United States v. Causey*, 9 F.3d 1341, 1343 (7th Cir. 1993). Thus, we will defer to the trial judge's probable cause determination unless Vanderpool demonstrates that Lt. Smith's affidavit was knowingly or intentionally false, or that Smith drafted the affidavit with a reckless disregard for the truth.

Vanderpool has failed to present one shred of evidence that Lt. Smith knowingly or intentionally included a false statement in the affidavit, or that he included material in the affidavit with reckless disregard for the truth. Vanderpool raised two examples to support his "fraud upon the court" claim: 1) that Lt. Smith could not recall the suppression hearing, and 2) that Lt. Smith was unable "to testify consistently on material points of fact and law." The alleged inconsistency in testimony (which we derived from the district court's opinion and Lt. Smith's brief because the argument section of Vanderpool's brief contained no reference to any specific inconsistencies) was that the various Affidavits of Probable Cause signed and sworn by Lt. Smith differed on whether the bingo permit that FOP President Pratt removed from the Bingo Center was an original or a photocopy.

Neither Lt. Smith's alleged faulty memory nor any misstatement that Lt. Smith may have made regarding the reprographic quality of the FOP permit was material.

Immaterial misstatements will not invalidate an otherwise legitimate warrant. *United States v. Oakley*, 944 F.2d 384, 387 (7th Cir. 1991); *see Causey*, 9 F.3d at 1343; *United States v. Markling*, 7 F.3d 1309, 1316 (7th Cir. 1993). Moreover, an affidavit procured in part by tainted evidence is not necessarily invalid because the untainted information, considered by itself, may establish probable cause for the warrant to issue. *Markling*, 7 F.3d at 1316; *Oakley*, 944 F.2d at 387-88; *see Franks*, 438 U.S. at 155-56. In that regard, Vanderpool has presented no evidence or arguments that the Wayne County Superior Court would have refused to issue the arrest warrant if Lt. Smith's Affidavit lacked the information that Vanderpool now contends was inconsistent. Because there is no genuine issue of material fact regarding whether Lt. Smith knowingly or recklessly provided false information on the affidavit, there is no constitutional violation and Vanderpool's § 1983 claim against Lt. Smith must fail.

Finally, regardless of whether the affidavit was sufficient to support the probable cause necessary for the arrest warrant, Lt. Smith would have been entitled to qualified immunity. The same standard of "objective reasonableness" that applies in the *Leon* suppression hearing context similarly applies in cases where an officer's warrant request allegedly causes an unconstitutional arrest. *Malley*, 475 U.S. at 344-45. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." *Id.* (citation omitted).

The facts and law presented to Lt. Smith demonstrate that he acted objectively reasonable in issuing the Affidavit of Probable Cause used to support Vanderpool's

arrest warrant. The Affidavit detailed several facts giving rise to Lt. Smith's reasonable belief that Vanderpool had violated the law: Lt. Smith observed Vanderpool close the door of the gambling machine room on April 3, 1992; Lt. Smith subsequently discovered and seized the machines in that room; Vanderpool supervised customer use of those gaming machines; and Vanderpool paid the winnings from those machines to the customers. Without question, this evidence would lead a reasonable officer to believe that there was probable cause to arrest Vanderpool on gambling charges.

C. *Appellants' § 1983 Claims Against the Richmond Police Department and Unnamed Police Officers*[5]

We summarily affirm the district court's grant of summary judgment in favor of the Richmond Police Department on Appellants' § 1983 claims. In order to pursue a § 1983 claim against a municipality or local governmental department, such as a police department, plaintiffs must demonstrate that they have suffered a

---

[5] In its brief, the Richmond Police Department asserts that Forman, Dix, and Vanderpool waived their § 1983 claims against the Richmond Police Department as an independent entity and against the fifty unnamed officers of that department ("John Does 1-50") because Appellants "fail[ed] to present or argue those issues" on appeal. In their brief, Appellants generally refer to the "actions of Smith and the officers of the Richmond Police Department" without further description of the Department as an "individual entity" or designation of the officers as "unnamed officers" or "John Does." Thus, we note that it is only out of an abundance of labored thoroughness that we discuss the merits of these two claims.

deprivation of their constitutional rights based on some official policy or custom of the municipality or department. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694 (1978). In that regard, "a direct causal link" must exist between the "municipal policy or custom and the alleged constitutional deprivation." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Nowhere in their brief do Forman, Dix, or Vanderpool assert any constitutional deprivation as a result of an official policy or custom of the Richmond Police Department. As such, we easily reject their appeal against the Richmond Police Department.

To the extent that Forman, Dix, or Vanderpool raised any claims on appeal against any unnamed officers of the Richmond Police Department ("John Does 1-50"), we find that those claims are time barred. Appellants failed to name the "John Does" within Indiana's two-year statute of limitations for personal injuries, which applies to § 1983 claims. *See Perez v. Sifel*, 57 F.3d 503, 505 (7th Cir. 1995) ("[T]he two-year Indiana statute of limitations for personal injuries (Ind.Code § 34-1-2-2) applies to § 1983 claims.").

Regardless of the statute of limitations, these unnamed officers would be entitled to qualified immunity for their actions in the search of the Bingo Center, the seizure of the gambling machines, and the arrests of Forman, Dix, and Vanderpool. Their actions, presumably like those of Lt. Smith, similarly did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. As such, the district judge could properly grant summary judgment in favor of the unknown officers. *See Hunger v. Leininger*, 15 F.3d 664, 669 (7th Cir.) ("A district

judge is authorized to grant summary judgment to a party that has not requested it. . . . "), *cert. denied,* 115 S. Ct. 123 (1994).

The summary judgment orders granted by the district court are hereby AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

(2)

Supreme Court, U.S.
FILED
OCT 27 1997
CLERK

No. 97-563

In The

Supreme Court of the United States

October Term, 1997

MARC FORMAN, GUY VANDERPOOL, AND WILLIAM DIX,

Petitioners,

vs.

CITY OF RICHMOND, INDIANA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

DAVID R. DAY*
MARK A. PALMER
G. RONALD HEATH
ANDRIELLE M. METZEL
JOHNSON, SMITH, PENCE,
DENSBORN, WRIGHT & HEATH
Suite 1800, One Indiana Square
Indianapolis, IN 46204
(317) 634-9777
Counsel for Respondents
City of Richmond, et al.
**Counsel of Record*

COPY

PARTIES TO THE PROCEEDING[1]

This Petitioners are Marc Forman, Guy Vanderpool and William Dix.

The Respondents are the Richmond Police Department and Mark Smith, Individually and as an officer with the Richmond Police Department.

Although the City of Richmond, Indiana, is listed in the caption as a party to the case, it was dismissed from this case by order of the District Court. No appeal challenging the dismissal of the City of Richmond by the District Court was considered by the Seventh Circuit Court of Appeals.

The Brief in Opposition is filed on behalf of the Richmond Police Department and Mark Smith, Individually and as an officer with the Richmond Police Department.

1

The names of the parties to the proceeding in the Seventh Circuit, whose judgment is sought to be reviewed, do not appear in the caption and do not appear within the Petition for Writ of Certiorari. In compliance with Supreme Court Rule 14(b), the names are therefore provided herein.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	*i*
Table of Contents	*ii, iii*
Table of Authorities	*iv,v*
Prior Court Opinions	*vi*
Statement of Jurisdiction	*vi*
Constitutional Provisions	*vi*
Statutory Provisions	*vii*
STATEMENT OF THE CASE	1-7
A. Course of Proceedings and Disposition of the Case Below	1-2
B. Correction of Misstatements in the Petition	2-7
Reasons for Denying the Petition for Writ	8-15
THERE IS NO REASON FOR THIS COURT TO CONSIDER THE CONSTITUTIONAL ISSUES PRESENTED, BECAUSE THE PETITION DOES NOT RAISE ANY SUBSTANTIAL QUESTION FOR REVIEW.	
A. The Petition Does Not Ask This Court To Settle Issues of Law	8-9

B. The Petition Does Not Demonstrate That Summary Judgment Was Erroneously Entered on Behalf of the Respondents 9-13

C. The Petition Does Not Demonstrate the Existence of Any Confusion or Conflict in the Lower Courts Regarding the Issue of Qualified Immunity 13-15

Conclusion 15

Appendices

"A" Unpublished Order of the United States District Court for the Southern District of Indiana, Indianapolis Division (issued April 1, 1996) A1-A24

"B" Opinion of the Indiana Supreme Court issued (March 11, 1996) A25-A34

"C" U.S. Const amend IV A35

"D" U.S. Const. amend XIV A36-A37

"E" 42 U.S.C. § 1983 ..... A38

TABLE OF AUTHORITIES

Cases Cited: **Page**

Anderson v. Creighton,
483 U.S. 635 (1987) 11, 12, 14

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 3, 9

Gomez v. Toledo,
446 U.S. 635 (1980) 10

Goodman v. Lukens Steel Co.,
482 U.S. 656 (1987) 8

Graver Tank & Mfg. Co. v. Linde Air Prod. Co.,
336 U.S. 271 (1949) 8

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 10, 11

Hunter v. Bryant,
502 U.S. 224 (1991) 9, 10

Illinois v. Rodriguez,
497 U.S. 177 (1990) 3, 8

Malley v. Briggs,
475 U.S. 335 (1986) 10

Pierson v. Ray,
386 U.S. 547 (1967) 3, 12

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 8

Sigert v. Gilley,
500 U.S. 226 (1991) 10

Forman v. Richmond Police Department,
104 F.3d 950 (7th Cir. 1997) ..... *vi*, 14

Juriss v. McGowan,
957 F.2d 345 (7th Cir. 1992) 12, 13

Rakovich v. Wade,
850 F.2d 1180 (7th Cir. 1988) 9

Haney v. Timesavers, Inc.,
1993 U.S. Dist LEXIS 14646 (D. Or. 1993) 8

State of Indiana v. Marc Forman,
662 N.E.2d 929 (Ind. 1996) ..... *vi*, 5, 13

Indiana v. Forman,
649 N.E.2d 120 (Ind.App. 1995) 13

Constitutional Provisions:

U.S. Const. amend. IV..... *vi*, 2, 10, A

U.S. Const. amend. XIV..... *vi*, 2, A

Statutes Cited:

42 U.S.C. § 1983..... *vii*, 1, 2, 6, 10, A

Rules Cited:

Sup. Ct. R. 14(b)..... *i*

Sup. Ct. R. 14(f)..... *vi, vii*

Sup. Ct. R. 15.2..... 2, 3

PRIOR COURT OPINIONS

Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Seventh Circuit (hereinafter "Seventh Circuit"). The opinion of the Seventh Circuit has been reported and appears at 104 F.3d 950 (7th Cir. 1997) and is reproduced as Appendix "A" and contained within the Petition for Writ of Certiorari. The Order on Cross Motions for Summary Judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division (hereinafter "District Court") has not been published. The unpublished Order of the District Court is reproduced verbatim herein at Appendix "A". The opinion of the Indiana Supreme Court has been reported and appears at 662 N.E.2d 929 (Ind. 1996) and is reproduced verbatim herein at Appendix "B".

STATEMENT OF JURISDICTION

Mark Smith does not contest this Court's jurisdiction over the claims asserted against him. The jurisdiction of the Court over the Respondent, Richmond Police Department, is disputed, because the Petitioner does not raise as error the Seventh Circuit Court's decision affirming the District Court's Order granting summary judgment in its favor.

CONSTITUTIONAL PROVISIONS[2]

The constitutional provisions here involved are the Fourth and Fourteenth Amendments to the United States Constitution and are set out verbatim herein as Appendices "C" and "D".

2

Constitutional provisions at issue do not appear within the Petition for Writ of Certiorari. In compliance with Supreme Court Rule 14(f), these constitutional provisions are included herein.

STATUTORY PROVISIONS[3]

The statutory provision here involved is 42 U.S.C. § 1983 and is set out verbatim herein as Appendix "E".

3

The statutory provision here involved does not appear within the Petition for Writ of Certiorari. In compliance with Supreme Court Rule 14(f), the relevant statutory provision is included herein.

STATEMENT OF THE CASE

The Respondents respectfully oppose the Petition for Writ of Certiorari (hereinafter "the Petition") which is replete with numerous misstatements of both the facts and the applicable law in this case.

A. Course of Proceedings and Disposition of the Case Below.

In their Complaint and Amended Complaint, Marc Forman (hereinafter "Forman"), William Dix (hereinafter "Dix"), and Guy Vanderpool (hereinafter "Vanderpool") contended that Mark Smith, a Lieutenant on the Richmond, Indiana Police Department, the Wayne County, Indiana Prosecutor Terry O'Maley ("Prosecutor O'Maley"), the City of Richmond, Indiana and "John Does 1-50" violated 42 U.S.C. §§ 1983 and 1985 by depriving them of their rights under the United States Constitution, the Indiana Constitution, and various statutory provisions. All three plaintiffs brought state law claims of false arrest and false imprisonment, and Dix added a state claim for defamation.

The district court dismissed the claims against Prosecutor O'Maley and the City of Richmond in separate orders issued on October 6, 1995. The remaining parties filed cross motions for summary judgement in January and February of 1995. The district court granted Lt. Smith's and the Richmond Police Department's motion and denied the Plaintiffs' motion. With regard to the claims against Lt. Smith, the court held that Lt. Smith either did not violate the Plaintiffs' constitutional rights or that he was entitled to qualified immunity for any constitutional or state law violations that did occur. Next, the court found that Plaintiffs failed to establish that the Richmond Police Department violated their constitutional rights through some official policy or custom. Finally, the court ruled in favor of the unnamed police officers ("John Does 1-50") because Plaintiffs failed to identify them within the applicable two-year statute of limitations. The court also noted that these defendants would have been entitled to the same qualified immunity as Lt. Smith.

Forman, Dix and Vanderpool subsequently appealed the District Court's Order to the Seventh Circuit. The only issues preserved for appeal were whether Lt. Smith, the Richmond Police Department, or any other officers from the department violated 42 U.S.C. § 1983 by depriving them of their constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. Prosecutor O'Maley and the City of Richmond were not parties to the appeal. No effort on behalf of Forman, Dix or Vanderpool was exerted to challenge the district court orders dismissing those parties.

The Seventh Circuit upheld the District Court's determination that there were no genuine issues of material fact which precluded the District Court from granting summary judgment in favor of Lt. Smith and the Richmond Police Department on the issues of qualified immunity. Specifically, with regard to the claims asserted by Forman against Lt. Smith, the Seventh Circuit found that the District Court correctly determined that Lt. Smith was entitled to qualified immunity. The Seventh Circuit also determined that the District Court correctly found that Dix's claims were without merit and that Lt. Smith was clearly entitled to qualified immunity with regard to them. In addition, the Seventh Circuit found that the District Court correctly concluded that the claims asserted by Vanderpool were not supported by any evidence and that Lt. Smith also had qualified immunity under those circumstances. Finally, the Seventh Circuit summarily affirmed the District Court's entry of summary judgment in favor of the Richmond Police Department regarding the § 1983 claims. Like the District Court, the Seventh Circuit noted that Forman, Dix and Vanderpool failed to assert that any constitutional deprivation arose as a result of an official policy or custom of the Richmond Police Department.

B. Correction of Misstatements in the Petition.

The opinions of the Seventh Circuit and the District Court correctly set forth the facts of this case and Respondents respectfully direct the Court's attention to the lower courts' opinions and orders. Pursuant to United States Supreme Court Rule 15.2, however, Respondents are obligated to bring to the Court's attention any

misstatements made in the Petition. The Respondents observe that the Petition is riddled with inaccuracy and misstatements. Petitioners' also fail to accurately cite several cases which they believe support their Petition.[4] In addition, the Petition lacks sufficient clarity to allow Respondents to enjoy a ready and adequate understanding of the points and arguments which Petitioners' ask this Court to consider. Because of these several deficiencies, Respondents must undertake the arduous task of first "re-constructing" Petitioners' Statement of the Case in order to comply with the requirements of Rule 15.2.

First, the Petition erroneously portrays the findings of the United States Court of Appeals for the Seventh Circuit. Specifically, the Petition mischaracterizes the Seventh Circuit holding by claiming that the court determined that the warrantless search of the Richmond Plaza Bingo Center (hereinafter "Bingo Center") and subsequent seizure on April 3, 1992, was "proper." More accurately, the Seventh Circuit found that Lt. Smith was "entitled to qualified immunity" because his actions were "objectively reasonable" in light of the facts and law known to him at that time.

Overall, the Petition attempts to create factual disputes where none exist by making conclusory statements. The Petitioners' description of the events of April 3, 1992, leave the Respondents unsure of the Petitioners' point or points they ask this Court to review. Nevertheless, a complete accounting of the facts demonstrates that Lt. Smith, an investigator with a special unit of the Richmond Police

---

[4] The Petition lists the following incorrect citations:
Celotex Corp. v. Catrett, 47 U.S. 317 (1986), correctly cited *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Pierson v. Ray, 396 U.S. 547 (1967), correctly cited *Pierson v. Ray*, 386 U.S. 547 (1967).

Illinois v. Rodriguez, 110 S.Ct. 319 (1990), correctly cited *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793 (1990).

Department, received information that the Bingo Center was operating under an invalid gambling permit. After learning this information, Lt. Smith drove to the Bingo Center where he observed Petitioner Guy Vanderpool suddenly move to shut the door to a room at the rear of the Bingo Center. Lt. Smith approached Vanderpool and asked to speak with the operator of the Bingo Center. Vanderpool directed Lt. Smith to Luther Ogletree (hereinafter "Ogletree"). Ogletree identified himself to Lt. Smith as the operator of the Bingo Center. Lt. Smith requested Ogletree to produce a valid gambling permit, however, Ogletree was unable to comply with that request.

Lt. Smith then contacted the Wayne County Prosecuting Attorney, Terry O'Maley, for instructions and was advised to obtain a consent to search the premises from Ogletree. Ogletree was read the Consent to Search form, acknowledged his understanding of the form, affixed his signature to it and stated that he had nothing to hide.

During the search of the Bingo Center premises, several thousand dollars in cash, records and documents regarding proceeds, check books and a hand gun were discovered. Also during the search, the officers encountered a locked door, which was the same door Lt. Smith witnessed being closed by Vanderpool. Without asking for a key, the officers removed the door from its hinges as Ogletree stood quietly by. Ogletree never requested a stop of the search nor did he make any attempt to either qualify or withdraw his written consent to search the premises.

The officers entered the room and discovered ten illegal gambling machines and ten stools.[5] At that time, Ogletree disclaimed ownership of the machines, produced a copy of a written lease and stated that the room had been rented to Petitioner Marc Forman. Shortly thereafter, Vanderpool provided Lt. Smith with a set of keys, one of

---

5

The Petition appears to question the illegality of the gambling machines and inappropriately places before this Court a question which was not necessary to the decision below.

which opened the lock to the door which was removed from its hinges and another which opened the video gambling machines.

Although the Petition accurately states that Lt. Smith and the Richmond Police officers entered a locked room at the Bingo Center by removing the door from its hinges, the Petition fails to mention that the Seventh Circuit found that the entry was made while conducting the consensual, yet warrantless, search of the premises. Upon the advice of Prosecutor O'Maley, no individuals were arrested incidental to the search of the Bingo Center on April 3, 1992. The Petition's characterization of Lt. Smith's actions as well as its conclusory assertions regarding Lt. Smith and his decisions surrounding access to the locked room are not only misplaced but also deficient.

The Petition accurately reflects that state court criminal charges were asserted against Marc Forman; however, the Petition incorrectly states that the Indiana Supreme Court determined that Lt. Smith failed to act as a reasonable police officer in *State of Indiana v. Marc Forman*, 662 N.E.2d 929 (Ind. 1996). This misstatement of the findings of the Indiana Supreme Court should not mislead this tribunal. Evaluating the merit of Forman's motion to suppress based upon the challenged validity of the search of the locked room, the Indiana Supreme Court held, notwithstanding Ogletree's consent to search the Bingo Center, that, "Because the defendant (Forman) had a reasonable expectation of privacy in the leased (locked) room, there was no valid consent to search the premises, and no valid exception to the warrant requirement was claimed, the warrantless search of the leased premises was unconstitutional and the trial court's motion to suppress was appropriate." *State of Indiana v. Marc Forman*, 662 N.E.2d 929, 934 (Ind. 1996).

The Petition's portrayal of the Seventh Circuit's rationale for its decision conferring qualified immunity upon Lt. Smith is based upon similar distortions. The Petitioners describe the rational of the Seventh Circuit's decision as conferring qualified immunity because there was "no [then] prescribed duty to ask for a key." By the use of such a description, Petitioners fail to provide this Court with an accurate statement of the lower court's ruling. The Seventh Circuit determined

there were no genuine issues of material fact which prevented the district court from granting summary judgment in favor of Lt. Smith and the Richmond Police Department. The Seventh Circuit further found that the District Court correctly determined that Lt. Smith acted in an objectively reasonable manner in conducting the search of the Bingo Center and in arresting Marc Forman and that he was therefore entitled to qualified immunity, as a matter of law, for alleged violations of 42 U.S.C. § 1983.

Regarding Forman's unreasonable search and seizure claim, the Seventh Circuit initially addressed the issue of whether there were clearly established constitutional standards governing Lt. Smith's acts of removing the hinges to the door of a locked room as well as his subsequent entry and search of the locked room on the premises of an area to which a consensual search has been authorized. After an examination of the precedent available to guide a police officer's conduct in April 1992, the court concluded that the constitutional standards governing the scope of consensual searches were not clearly established and that it was not clear, at that time, that Lt. Smith should have asked Ogletree for a key to unlock the room.

Regarding Forman's warrantless arrest claim, the Seventh Circuit concluded that it was unnecessary to determine whether or not Lt. Smith participated in the warrantless arrest. The Seventh Circuit reasoned that if Lt. Smith did not participate in the alleged constitutional violation, then he could not be held liable under § 1983. Nevertheless, the facts demonstrated that, at the time of the arrest, Lt. Smith had probable cause to believe Forman had committed a felony because of his intimate involvement in owning or operating the gambling machines and placing them in the Bingo Center. The Seventh Circuit concluded that Lt. Smith was entitled to qualified immunity because his actions were objectively reasonable based upon the clearly established law and information he possessed at the time of the arrest.

The Seventh Circuit similarly rejected Dix's claims based upon his warrantless arrest, because Lt. Smith had probable cause for the arrest and since Dix was convicted for the underlying conduct leading to the arrest barring recovery under § 1983. The Petition's assertions

regarding Dix and the observations made by Lt. Smith are incomplete because they exclude the fact that, on two occasions, Dix was seen by Lt. Smith in the Bingo Center, which was operated without a valid gaming permit and in violation of Indiana law. In fact, Dix was seen in the Bingo Center office counting the proceedings and making records of an evening's bingo game. The Seventh Circuit noted that even if there was a genuine issue of material fact regarding whether or not probable cause existed for the arrest, that, under those circumstances, Lt. Smith was entitled to qualified immunity.

Vanderpool's claims based upon the lack of probable cause for his arrest pursuant to a warrant were also rejected. The Seventh Circuit found that Vanderpool's bald assertions, without more, failed to demonstrate that Lt. Smith knowingly or intentionally included a false statement within the probable cause affidavit or that he included material in the affidavit with reckless disregard for its truth. The Petition does not mention that Vanderpool was seen closing the door to the room containing illegal gambling machines, that he supervised use of those machines and made pay outs to customers, or that he possessed the keys to the room containing the machines. Under those circumstances, the Seventh Circuit acknowledged that Lt. Smith was entitled to qualified immunity for his actions related to the Vanderpool arrest.

Finally, the Petition erroneously characterizes information contained within the record regarding Lt. Smith, specifically the reference to "credibility problems." The Seventh Circuit rejected those same allegations and noted that the Plaintiffs had failed to present any evidence which undermined or served to question Lt. Smith's credibility. No new evidence is set forth in the Petition to support this continued assertion.

Reasons for Denying the Petition for Writ of Certiorari

THERE IS NO REASON FOR THIS COURT TO CONSIDER THE CONSTITUTIONAL ISSUES PRESENTED, BECAUSE THE PETITION DOES NOT RAISE ANY SUBSTANTIAL QUESTION FOR REVIEW.

A. The Petition Does Not Ask This Court To Settle Issues of Law.

The question presented for review in the Petition does not reflect any issues of law decided by the lower courts. The Petition does not reflect a conflict or division on a matter of law between the circuits. The Seventh Circuit found that conferring qualified immunity upon the Respondents was appropriate under the circumstances and upheld the district court's ruling. The Petition's factbound assertion that the courts below erroneously determined that the Respondents were entitled to qualified immunity are merely an attempt to create factual disputes where none exist and does not warrant review by this Court. The Seventh Circuit found that the "factual disputes" raised by Forman, Dix and Vanderpool were without merit and were not pivotal in the court's decision making. Additionally, the Petition fails to offer any new proof or evidence why the Respondents should not be entitled to qualified immunity. Finally, the point of law upon which the Seventh Circuit decided this case was not raised as error by Petitioners.

This Court has previously stated, "A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949), *and superseded by statute on other grounds as stated in Haney v. Timesavers, Inc.*, 1993 U.S. Dist LEXIS 14646 (D. Or. 1993).

The Petition is merely an attempt at yet another review of the facts in this case. Although the Petition makes mention of *Illinois v. Rodriguez*, 497 U.S. 177 (1990) and *Schneckloth v. Bustamonte*, 412

U.S. 218 (1973), it is completely bereft of any sound argument that those precedents were misapplied. The opinion of the Seventh Circuit includes and did not in any manner ignore those precedents. Nevertheless, both the district and appellate courts agreed that conferring qualified immunity was appropriate when interpreting these cases in conjunction with additional existing case law. Respondents urge that no further review of the qualified immunity issue is warranted, because the Petition merely seeks review of unsupported factual allegations and not of issues of law.

B. The Petition Does Not Demonstrate That Summary Judgment Was Erroneously Entered on Behalf of the Respondents.

The Petition appears to claim that the Seventh Circuit erroneously entered summary judgment on behalf of the Respondents, because there was a genuine issue of material fact and therefore the Respondents were not entitled to summary judgment as a matter of law. Although the Petition includes mention of this Court's standard for summary judgment as established in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Petition does not demonstrate any manner in which the Seventh Circuit's ruling was made contrary to this standard. The Petition also ignores the well established legal principal that qualified immunity is generally a question of law for the court to resolve and that summary judgment is the proper posture from which to decide this objective legal question. *Hunter v. Bryant*, 502 U.S. 224 (1991); *Rakovich v. Wade*, 850 F.2d 1180, 1201-02, 1204-05 (7th Cir. 1988), *cert. den.*, 488 U.S. 968.

The issues of fact alluded to by the Petition were found by the Seventh Circuit to be insubstantial and thereby insufficient to prevent an entry of summary judgment being granted in favor of Respondents. For example, in its analysis, the Court explicitly stated that regardless of whether Lt. Smith participated in the arrest of Forman, whether Lt. Smith had probable cause to arrest Dix and whether the affidavit was sufficient to support the probable cause necessary for the arrest of Vanderpool, Lt. Smith was entitled to qualified immunity under the

circumstances surrounding those fact sensitive events. These issues do not encompass the entirety of the claims against the Respondents, nevertheless, the Petition curiously directs this Court's attention to these factors as though they are in some manner dispositive of the summary judgment issue.

Additionally, the Petition appears to claim that summary judgment was entered in error and that the Respondents are somehow barred from entitlement to qualified immunity, because the initial search of the Bingo Center was found to be unconstitutional. The Petition misses the purpose of qualified immunity which is to give "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (*quoting Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)). After a defendant pleads a defense of qualified immunity, "[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but also whether that law was clearly established at the time the action occurred..." *Sigert v. Gilley*, 500 U.S. 226, 231-232 (1991)(*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In its analysis, a court should ask whether a defendant acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed after the fact. *See Hunter*, 502 U.S. at 228.

The Petition's conclusion, without more, that the actions of Lt. Smith were somehow "illegal and contrary to the Fourth Amendment" and were "patently unreasonable under the Fourth Amendment" lacks merit. Although difficult to discern, Petitioners appear to be arguing that an action which, in general, violates any constitutional provision, such as the Fourth Amendment, vis-a-vis, violates a "a clearly established right." In adopting this argument, Respondents believe that Petitioners fail to comprehend or appreciate the development of the doctrine qualified immunity.

This Court on several occasions has addressed the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity. A government official may plead the affirmative defense of qualified

immunity in an action brought pursuant to 42 U.S.C. § 1983. *Gomez v. Toledo*, 446 U.S. 635 (1980). Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken. *Harlow v. Fitzgerald*, 457 US 800, 816 (1982). The government official will be immune from liability if the conduct alleged in the complaint did not violate "clearly established, statutory or constitutional rights of which a reasonable person would have known." *Harlow* at 818.

In *Anderson vs. Creïghton*, 483 U.S. 635 (1987) this Court squarely addressed and rejected the very argument which Petitioners seek to present for review. In *Anderson*, this Court stated:

> "The operation of this standard [objective legal reasonableness], however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties, by making it impossible for officials reasonably to anticipate when their conduct may give rise to liability for damages. It should not be

> surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

Id. at 638 and 639.

Respondents construe Petitioner Forman's argument to be identical to the argument previously made and rejected by this Court in *Anderson*. This Court has already considered and decided the issues presented by Petitioners. Because Petitioners have not presented any compelling factual or legal reason why those issues should be revisited, this Court should deny the Petition.

The Petition additionally includes citations to *Pierson v. Ray*, 386 U.S. 547 (1967) and *Juriss v. McGowan*, 957 F.2d 345 (7th Cir. 1992) without supporting argument or explanation. Respondents, assuming that these citations are included within the Petition to demonstrate that the contours of the rights violated were clearly established at the time of the violation, assert that such precedent does not support the Petition's claims.

Nevertheless, the inclusion of *Pierson* is perplexing. In that 1967 case, officers made a claim that they should not have been held liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid but which was later held to be unconstitutional. This Court determined that a police officer is not entitled to absolute but rather a qualified type of immunity for actions related to said forms of arrests. Respondents note that this case is not and has not ever been one of absolute immunity. The Seventh Circuit did not base its ruling on the issue of absolute immunity. Therefore, *Pierson* is clearly distinguishable from this case and it

provides little, if any, guidance in ascertaining the crux of the Petition's arguments or support for them.

The citation to *Juriss* also fails to support the Petition. In *Juriss*, the Court recognized that qualified immunity is inappropriate if a reasonable officer would have known that the "particular action at issue" was unlawful in light of the law in effect at the time of the activity. *Juriss*, 957 F.2d at 350. In *Juriss*, an officer who knowingly arrested an individual with a warrant he knew was not supported by probable cause was not entitled to qualified immunity. Respondents first contend that the facts of *Juriss* are clearly distinguishable from the instant action. Next, aside from allegations that arrests of the Petitioners were unsupported by probable cause, the evidence before the Seventh Circuit and that presented within the Petition is not convincing nor does it challenge the probable cause issue. Finally, the *Juriss* opinion, in and of itself, does not make it clear that any action taken by Lt. Smith did not conform with actions that would have been taken by an objectively reasonable police officer faced with the same or similar facts and circumstances.

C. The Petition Does Not Demonstrate the Existence of Any Confusion or Conflict in the Lower Courts Regarding the Issue of Qualified Immunity.

Respondents find it difficult to ascertain exactly what the Petition attempts to convey, and note, however, that if the Petition is intended to assert any conflict between the opinion of the Seventh Circuit and that of the Indiana Supreme Court, the argument is unfounded.

The Supreme Court of Indiana reversed an Indiana Court of Appeals decision [*Indiana v. Forman*, 649 N.E.2d 120 (Ind.App. 1995)] upholding Lt. Smith's search of the Bingo Center. The Indiana Supreme Court found that Forman had an expectation of privacy in the locked room and that if the police reasonably believed that Ogletree gave permission to search the locked room, the police simply would have asked Ogletree to unlock the door. *State v. Forman*, 662 N.E.2d 929 (Ind. 1996). The court ultimately concluded that there was sufficient

evidence to demonstrate that Ogletree did not validly consent to a search of the locked room to support the trial court's grant of Forman's Motion to Suppress. Despite its finding, the Indiana Supreme Court acknowledged that it was a "close call whether or not Ogletree had actual common authority." *Forman*, 662 N.E.2d at 932.

As noted by both the District Court and the Seventh Circuit, the differing opinions of the Indiana Court of Appeals and the Indiana Supreme Court illustrate the constitutional uncertainty regarding the standards governing consent to search issues. That two courts could approach this issue and reach different conclusions suggests that the governing law was far from "clearly established" at the time of Lt. Smith's search. In addition, the Seventh Circuit pointed to several other cases, each decided prior to the search in question, which demonstrated, at a minimum, that there was no clearly established law applicable to the search of a locked room in April of 1992. The Seventh Circuit also regarded Lt. Smith's conferences with the prosecuting attorney as providing insight into the "objective reasonableness" of the officer's actions. Finally, the Seventh Circuit directly addressed the potential dilemma created by the Indiana Supreme Court opinion and stated the following:

> "Although we find that Lt. Smith is entitled to qualified immunity, we do not dismiss the Indiana Supreme Court's concern about police officers removing the door from its hinges when they could have easily asked someone to unlock the door. Nevertheless, there was no clearly established precedent holding that the failure to seek a key for a locked room found on premises that could otherwise be lawfully searched would result in a violation of anyone's Fourth Amendment rights."

Forman v. Richmond Police Department, 104 F.3d 950, (7th Cir. 1997).

Despite the above, Petitioners continue to assert that opinion of the Indiana Supreme Court that the search was unconstitutional and therefore unreasonable is conclusive and binding upon courts considering Petitioners § 1983 claims. Petitioner's reliance upon this argument has been rejected by this Court in *Anderson* and as such is

unfounded. See *Anderson* at 633 and 644. Therefore, any conflict between the opinion of the Seventh Circuit and that of the Indiana Supreme Court is illusory.

CONCLUSION

Respondents respectfully submit that this case presents no issue of law or fact that justifies review by the United States Supreme Court. The Petitioners have had appropriate review at both the District Court and Appellate Court levels. The decisions of those courts were and are proper and the Petition for Writ of Certiorari should be denied.

App. "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARC FORMAN, WILLIAM DIX, JR., and GUY VANDERPOOL, Plaintiffs,	)
V.	)Cause IP94-340-CM/F
CITY OF RICHMOND, INDIANA, LT. MARK SMITH, RICHMOND POLICE DEPARTMENT, TERRY O'MALEY, WAYNE COUNTY PROSECUTOR, JOHN DOES 1-50, Defendants.	)

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The present case now comes before this Court on Cross Motions for Summary Judgment. On February 4, 1994, Plaintiffs Marc Forman ("Forman"), William Dix, Jr. ("Dix") and Guy Vanderpool ("Vanderpool") (collectively referred to as "Plaintiffs") filed this litigation, contending that their constitutional and statutory rights had been violated by Defendants Lt. Mark Smith ("Lt. Smith"); the Richmond Police Department ("Police Department"); the City of Richmond, Indiana ("Richmond"); Terry O'Maley ("O'Maley"); and other unidentified police officers. In two separate Orders dated October 6, 1995, this Court dismissed O'Maley and Richmond from the action. For reasons stated fully below, this Court now DENIES the Motion for Summary Judgment filed by the Plaintiffs and GRANTS the Motion for Summary Judgment filed by Lt. Smith and the Police Department. In addition, this Court GRANTS summary judgment in favor of the still-unidentified John Doe Defendants.

I. BACKGROUND

This action arises from a police raid of an unlicensed bingo operation located in Richmond, Indiana. On April 3, 1992, Lt. Smith received information that the operators of the Richmond Plaza Bingo Center ("Bingo Center") had been using a charity bingo permit belonging to the Muncie Fraternal Order of Police ("FOP") without proper authorization from that group. Desig. of Evid. Mater. in Supp. of Defs.' Mot. for Summ. J. (hereinafter "Defs. Ex.") , Ex. 1, p. 14. FOP President Max Pratt told Lt. Smith that he had removed a copy of the permit from the Bingo Center and that he did not believe there was a valid bingo permit on the premises. Defs. Ex. 1, pp. 17, 18; Def's Ex. 2, p. 74.

That same evening, Lt. Smith went to the Bingo Center to determine whether it was operating under a valid permit. Defs. Ex. 1, p. 13; Defs. Ex. 2, p. 76. When Lt. Smith entered the Bingo Center, Luther Ogletree ("Ogletree") informed the officer that he was the operator of the bingo game and the lessor of the Bingo Center premises. Defs. Ex. 3, pp. 58-59. Lt. Smith asked Ogletree to show him the Bingo Center's operating permit and accompanied him to the office located in the rear of the building, where Dix and another volunteer were counting money from the night's bingo operations. Defs. Ex. 1, p. 16; Defs. Ex. 2, pp. 79, 86. After Ogletree searched the office and failed to produce a permit, Lt. Smith informed him that the Bingo Center was operating illegally and called in additional officers from the Police Department to help shut down the building. Defs. Ex. 2, pp. 86, 88. Lt. Smith also called the Wayne County Prosecutor, Terry O'Maley ("O'Maley") to discuss whether a warrant would be needed in order to search the premises. Defs. Ex. 2, p. 90. During the conversation, O'Maley told Lt. Smith that if valid consent was given to search the building, no search warrant would be needed. Defs. Ex. 2, pp. 135-136.

After obtaining a standard consent to search form from one of the uniformed officers, Lt. Smith read the contents of the form to Ogletree. Defs. Ex. 2, pp. 114-15; Defs. Ex. 3, p. 59. Ogletree stated that he understood the document and signed the form. Defs. Ex. 2, pp. 114-15; Defs. Ex. 3, p. 60; Defs. Ex. 4. During the search of the office,

Lt. Smith and other officers found several thousand dollars in cash, the Bingo Center's operating records and check books, and a handgun. Defs. Ex. 2, pp. 90-91. In addition, the officers attempted to enter a room located at the rear of the building but found that it was locked. After removing the hinges from the door, police found ten gambling machines inside the room. Defs. Ex. 1, p. 21. Although Ogletree was present while the officers removed the door, he stood by without requesting that the search stop or attempting to withdraw or qualify his written consent to the search. Defs. Ex. 3.

After the door had been removed, Ogletree informed Lt. Smith that the machines belonged to Marc Forman and provided Lt. Smith with a copy of the parties' lease agreement. Defs. Ex. 2, p. 22; Defs. Ex. 5. Vanderpool gave Lt. Smith keys to both the room and the machines and stated that he was working as a volunteer at the Bingo Center under Ogletree's supervision. Defs. Ex. 3, pp. 76-77. After a conversation with O'Maley, Lt. Smith confiscated the currency, gambling machines, and bingo operations records found in the Bingo Center. Defs. Ex. 6, p. 2. Forman himself telephoned Lt. Smith and claimed ownership of the machines later that evening. Defs. Ex. 3, p. 67.

On April 6, 1992, Ogletree presented Lt. Smith with a second bingo permit, bearing the name and address of the New Hope Missionary Baptist Church of Dayton, Ohio. Defs. Ex. 8, p. 1. Lt. Smith traveled to Dayton on April 7, 1992, but found no church located at that address. Defs. Ex. 8, p. 2. He also contacted the Indiana Secretary of State for additional information regarding the permits used by the Bingo Center. Defs. Ex. 8, p. 2. He presented an affidavit containing these findings to the Wayne County Superior Court and obtained a search warrant for the Bingo Center. Defs. Ex. 8. Several officers from the Police Department executed the search warrant on April 8, 1992 and arrested Dix, Ogletree, and another volunteer on charges of professional gambling. Over the next two days, newspapers in Richmond, Muncie, and Dayton reported that the Bingo Center had been searched, that the permit used by the Bingo Center belonged to a nonexistent entity, and that Dix had been arrested on related charges.

Charges were filed against Dix based on his activities at the Bingo Center during the first search on April 3, 1992. Defs. Ex. 10. On September 22, 1992, Lt. Smith filed an Affidavit of Probable Cause and an Information--both prepared by O'Maley--alleging that Dix had committed two class D felonies: Professional Gambling and Theft. Defs. Ex. 10. Dix filed a motion to dismiss the charges and a motion to suppress the evidence taken during the search, but the Wayne County Court denied both motions. Defs. Ex. 11. A jury convicted Dix on both counts on April 21, 1993, and Dix received a 1 ½ year sentence. Defs. Ex. 11. The Indiana Court of Appeals affirmed Dix's conviction on August 30, 1994. Defs. Ex. 12.

On April 20, 1993, police officers made a warrantless arrest of Forman in the hallway of the Wayne County Courthouse. Defs. Ex. 13. Lt. Smith had previously signed an Affidavit of Probable Cause against Forman on June 29, 1992, based on Forman's knowledge and ownership of the machines found during the first search of the Bingo Center. Defs. Ex. 7. This Affidavit was filed with the Wayne County Court on April 30, 1993, and Forman was charged with two counts of Professional Gambling. Defs. Ex. 7. On May 4, 1993, Forman filed a motion to suppress the evidence found in the locked room at the Bingo Center. After a hearing on the matter, the court granted Forman's motion and stated that the officers should have obtained express consent prior to removing the hinges from the door to the back room. Defs. Ex. 19. O'Maley dismissed the case against Forman on August 18, 1993, and stated that "the Court's ruling on the Defendant's Motion to Suppress precludes further prosecution." Defs. Ex. 20. On April 12, 1995, the Indiana Court of Appeals reversed the trial court's decision on the motion to suppress. Indiana v. Foreman, 649 N.E.2d 120 (Ind. Ct. App. 1995). Subsequently, in an Order dated March 18, 1996, the Supreme Court of Indiana reversed the Court of Appeals. Indiana v. Foreman, N.E.2d _, 1996 WL 116206 (Ind.).[1]

---

[1] It is significant to remember the legal standards behind the appellate review of this case. The Court of Appeals noted that the state must show the trial court's ruling to be "contrary to law." Forman, 649

The third Plaintiff in the present action, Vanderpool, was also arrested on charges relating to the gambling operations observed on April 3, 1992. During its investigation, the Police Department obtained evidence that Vanderpool had assisted Forman in moving the machines into the building, had supervised the customers' use of the machines, and had paid the customers their winnings. Defs. Ex. 15. On June 29, 1992, Lt. Smith signed an affidavit regarding Vanderpool's involvement with the gambling machines and his assistance with the bingo operations. Defs. Ex. 15. On April 30, 1993, O'Maley filed this affidavit and an information regarding the gambling charges, and the court issued an arrest warrant ten days later. Defs. Exs. 16, 17. Lt. Smith arrested Vanderpool on June 2, 1993. Defs. Ex. 18. O'Maley filed a motion to dismiss the charges on May 9, 1994. Defs. Ex. 22.

N.E.2d at 123. "We will reverse a negative judgment only when the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that of the trial court." Id. Upon review of the evidence, the court determined that all the evidence pointed to the conclusion that Ogletree had common authority over the premises. "Notwithstanding the high standard which the State must overcome on appeal from a negative judgment, we hold, as a matter of law, that the police officers' belief that Ogletree possessed common authority over the room leased to Foreman was reasonable." Id. at 125 (emphasis added).

In reversing the Court of Appeals, Indiana's Supreme Court did not reach conclusions "as a matter of law" regarding the evidence. Instead, the Court simply noted that "the evidence was at least conflicting that the officers reasonably believed that Ogletree had common authority over the leased premises." Forman, 1996 WL116206, at *2. Since conflicting evidence existed, the Supreme Court concluded that the Court of Appeals should have sustained the trial court. Id. at *3 ("[T]here was sufficient evidence that Ogletree did not validly consent to a search of the leased premises to support the trial court's grant of the motion to suppress.").

In the Amended Complaint, the Plaintiffs contend that Lt. Smith and the Police Department violated 42 U.S.C. §§ 1983 and 1985. More specifically, they assert that these Defendants violated their rights under the federal Constitution, the Indiana Constitution, and various other statutory provisions. The Plaintiffs also claim that they were subjected to false arrest and false imprisonment.

On January 31, 1995, the Plaintiffs filed a Motion for Summary Judgment. On February 1, 1995, Lt. Smith and the Police Department also filed a Motion for Summary Judgment. These Motions are now ripe for resolution.

II. SUMMARY JUDGMENT STANDARD

Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides that a court shall grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." When this standard has been met, summary judgment is mandatory. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Shields Enters., Inc. v. First Chicago Corp., 975 F.2d 1290, 1294 (7th Cir. 1992). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Rather, the disputed facts must be outcome determinative. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Schroeder v. Barth, 969 F.2d 421, 423 (7th Cir. 1992). Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. Anderson, 477 U.S. at 248. Irrelevant or unnecessary facts will not preclude summary judgment even when in dispute. Clifton v. Schaefer, 969 F.2d 278, 281 (7th Cir. 1992). Guided by these standards, this Court now considers the motions for summary judgment. For the sake of clarity, this Order shall first discuss each Plaintiffs' § 1983 claims against Lt. Smith and then discuss the § 1983 claims against the Police Department. Next, the § 1985 claims shall be discussed. Finally, this Order shall examine the claims against the John Doe Defendants.

III. THE § 1983 CLAIMS

Under 42 U.S.C. § 1983, a person "who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, or other proper proceeding for redress." To prevail in a § 1983 claim, a plaintiff must show that "(1) the defendant, while acting under color of state law, engaged in specified conduct, and (2) the specified conduct worked to deprive the plaintiff of rights privileges, or immunities secured to [him] by the United States Constitution or other federal law." Blanton v. City of Indianapolis, 830 F. Supp. 1198, 1201 (S.D. Ind. 1993); Brown v. City of Lake Geneva, 919 F.2d 1299, 1301 (7th Cir. 1990).

A. FORMAN'S § 1983 CLAIMS AGAINST LT. SMITH

In the Amended Complaint, Forman raises three separate claims. First, he contends that Lt. Smith violated his constitutional rights by conducting an illegal, warrantless search of the back room of the Bingo Center. Second, he alleges that he was subjected to an unconstitutional warrantless arrest unsupported by probable cause. Third, he alleges that this warrantless arrest represented false arrest and false imprisonment in violation of Indiana law. While these latter two claims do not specifically mention Lt. Smith, Forman has contested Lt. Smith's motions to dismiss these claims against him; therefore, this Court shall examine whether summary resolution of these claims would be appropriate.

1. THE WARRANTLESS SEARCH

In Count I, Forman alleges that Lt. Smith's search of the back room of the Bingo Center violated the Fourth and Fourteenth Amendments to the United States Constitution, as well as Article I,

Section 11 of the Indiana Constitution. In response, Lt. Smith asserts that, even if Forman's constitutional rights have been violated, he is entitled to qualified immunity and may not be held liable for any violation.

Government officials performing discretionary functions possess qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). More specifically, a court must answer "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." Anderson v. Creighton, 483 U.S. 635, 641 (1987). The Supreme Court has emphasized that courts must examine whether the law was clearly established at the time an action occurred. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he be fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." Harlow, 457 U.S. at 818.

Under these standards, Lt. Smith is entitled to qualified immunity for the search of the locked room at the bingo center if he reasonably believed the search to be lawful based upon clearly established law and the facts he possessed at the time of the search. Certain aspects of Fourth Amendment law must be considered "clearly established" for purposes of the present case. While the Fourth Amendment generally requires the police to obtain a warrant prior to initiating a search, "a search conducted pursuant to a valid consent is constitutionally permissible." Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). The Supreme Court has also indicated that a third party with common authority over the premises may give consent to a warrantless search. United States v. Matlock, 415 U.S. 164, 171 (1974). Moreover, "a warrantless search is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises"--even if that third party does not in fact possess such authority. Illinois v. Rodriguez, 497 U.S. 177, 179 (1990).

According to these precedents, this Court must determine whether Lt. Smith could reasonably have believed that Ogletree possessed common authority over the locked room at the time of the search. The facts indicate that such a belief would have been reasonable. Upon entering the bingo center, Lt. Smith spoke with Ogletree, who identified himself as the operator of the bingo center and the lessor of the premises. Prior to initiating the search, Lt. Smith obtained a consent form and read the contents to Ogletree. Ogletree indicated that he understood the document and signed the form. When the police found the back room to be locked, they did not consult with Ogletree but instead removed the door from its hinges and entered the room, where they discovered the gambling machines. The evidence does not suggest that Ogletree ever attempted to withdraw or qualify his consent to search. [2] Only after the police had discovered the machines did Ogletree inform Lt. Smith that Forman had leased the room.

Based upon Ogletree's identification of himself as lessor of the Bingo Center and Ogletree's signature on the consent form, Lt. Smith could reasonably have believed that Ogletree had consented to a search of the entire Bingo Center. At the very least, Lt. Smith could have reasonably believed that Ogletree had common authority over the entire premises. At the time Lt. Smith conducted this search, it was not clearly established that an officer who has obtained written consent for a search

---

2

The lone evidence the Plaintiffs advance suggesting that Ogletree had not consented to a search of the locked back room comes in an Affidavit submitted by Vanderpool. According to Vanderpool, he heard Ogletree tell Lt. Smith that another party had leased the locked room prior to the removal of the hinges from the door. However, this evidence constitutes hearsay which is not admissible for purposes of the present motion.

must request a key to a locked room on the premises.[3] Therefore, this Court concludes that Lt. Smith could have reasonably believed the warrantless search--including the removal of the door to the locked back room--to be lawful. Accordingly, Lt. Smith possesses qualified immunity and may not be held liable by Forman for any violation of his constitutional rights resulting from the search of the Bingo Center.[4]

2. THE WARRANTLESS ARREST

In Counts II and III, Forman alleges that various officials violated his rights by arresting him. In these Counts, Forman does not specifically mention Lt. Smith; however, Forman has opposed Lt. Smith's efforts to have these Counts dismissed against him. In response to an interrogatory asking if Forman contends that Lt. Smith ordered or participated in his arrest, Forman responded: "Lt. Smith may deny his role as one who either ordered the arrest or participated, but there are sufficient facts to conclude that he, at minimum, knew about it, and at maximum, ordered and/or participated in the same - based on the present information." Defs. Ex. 25.

Even assuming Counts II and III do state claims against Lt. Smith, Forman's claims under these two cannot survive Lt. Smith's

---

[3] In fact, the differing opinions of the Indiana Court of Appeals and the Indiana Supreme Court illustrate the constitutional uncertainty regarding this question. That two courts could approach this issue and reach different conclusions suggests that the answer is far from "clearly established."

[4] The Plaintiffs' counsel has argued forcefully that Lt. Smith lacked probable cause to search the bingo parlor or the locked room. However, since Lt. Smith obtained Ogletree's consent prior to initiating the search, the question of probable cause has no relevance to the validity of the search or to the existence of qualified immunity.

Motion for Summary Judgment. As noted by the Seventh Circuit, "'[s]ection 1983 creates a cause of action based upon personal liability and predicated upon fault. An individual cannot be held liable in a § 1983 action unless he caused or participated in an alleged constitutional deprivation.'" Rascon v. Hardiman, 803 F. 2d 269, 273 (7th Cir. 1986) (emphasis omitted) (quoting Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983)); Lile v. Tippecanoe County Jail, 844 P. Supp. 1301, 1308 (N.D. Ind. 1986).

No facts presently before this Court directly establish that Lt. Smith caused or participated in Forman's arrest. According to the evidence, the police arrested Forman in a hallway at the police station, and the facts do show that Lt. Smith was present at the time and place of the arrest. In support of the claim that Lt. Smith may have caused or participated in the arrest, Forman points to four f acts. First, prior to the actual arrest, said "watch this" to another officer; after that, an officer stopped Forman and placed handcuffs on him. Second, after Forman had been led away, Lt. Smith laughed. Third, Lt. Smith participated in the investigation from its outset, discussing various matters with O'Maley. Fourth, the Plaintiffs note a conflict between interrogatory answers of Lt. Smith and O'Maley. According to Lt. Smith, O'Maley directed Officer Branum to make the arrest; however, O'Maley stated that he did not learn about the arrest until after it had occurred.

While these facts do not constitute direct evidence that Lt. Smith caused or participated in the decision to arrest Forman, they may create at least a genuine issue of fact. However, even if Lt. Smith did cause or participate in the arrest, he is entitled to qualified immunity for his action. As previously noted, qualified immunity shields police officers from suit for damages if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." Hunter v. Bryant, 502 U.S. 224, 227 (1991); Edwards v. Cabrera, 58 F.3d 290, 292 (7th Cir. 1995). Of course, Lt. Smith would be entitled to qualified immunity if he had probable cause to arrest Forman, meaning that "the facts and circumstances within [his] knowledge . . . were sufficient to warrant a prudent man in believing" that Forman had violated the law. Hunter, 502 U.S. at 228; Edwards, 58 F.3d at 292. A court should determine

whether the police had probable cause based upon the information available to them at the time of the arrest. Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Edwards, 58 F.3d at 292. However, "[e]ven if probable cause was lacking with respect to this arrest, despite [Lt. Smith's] subjective belief that [he] had probable cause, [he is] entitled to qualified immunity as long as [his] belief was objectively reasonable." Edwards, 58 F.3d at 293; Hunter, 502 U.S. at 227.

When the police arrested Forman, they had observed the gambling machines in the back of the Bingo Center. Ogletree informed Lt. Smith that the room had been leased by Forman. Forman himself confirmed that he had an interest in the machines. According to the Probable Cause Affidavit, Forman, in the company of his attorney, presented himself to the Wayne County Prosecutor's Office on April 6, 1992 and "stated that those machines were his and that he placed them there in the Richmond Plaza Bingo Center for profit." Defs. Ex. 7. Based upon these facts, Lt. Smith could have reasonably believed that probable cause existed to arrest Forman. Although O'Maley did determine at a later time that probable cause did not exist, that determination does not impact this Court's inquiry. Lt. Smith's qualified immunity depends upon the known facts and law at the time of the arrest--not upon subsequent legal analyses. This Court concludes, therefore, that Lt. Smith is entitled to qualified immunity from Forman's claims under Counts II and III of the Amended Complaint.[5]

---

[5] In addition, Forman has raised a general challenge to Lt. Smith's credibility. In the Memorandum in Support of Summary Judgment and the Response to Lt. Smith's Memorandum in Support of Motion for Summary Judgment, the Plaintiffs' counsel notes certain inconsistencies between Lt. Smith's statements in the various phases of the litigation stemming from the search and subsequent arrests. For example, the briefs note that Lt. Smith referred to "the Muncie FOP charity bingo license" in the Dix Affidavit of Probable Cause; however, in the Forman Affidavit of Probable Cause, Lt. Smith referred to a photocopy of the bingo permit. While a "material misrepresentation in a probable cause affidavit is actionable under § 1983," Pennington v. Hobson, 719

B. DIX'S §1983 CLAIMS AGAINST LT. SMITH

In Counts IV, V, and VI of the Amended Complaint, Dix asserts various claims against Lt. Smith. In Count IV, he challenges his arrest on constitutional grounds; in Count V, he alleges that the arrest represented false arrest or false imprisonment under Indiana law. In Count VI, he claims that Lt. Smith and other unidentified Richmond police officers committed the tort of defamation against him.

1. THE CONSTITUTIONAL CLAIMS

The constitutional claims raised in Count IV of the Amended Complaint lack the focus of Forman's constitutional arguments. It is not entirely clear whether Dix challenges his arrest or the April 8 search of the Bingo center. For purposes of thoroughness, this Court shall assume that Dix challenges both.

Dix first claims that Lt. Smith did not have adequate probable cause to support the issuance of the warrant for the April 8 search. According to the evidence presently before this Court, after closing down the bingo game on April 3, Lt. Smith told Ogletree that the game must remain closed until Ogletree could provide a proper bingo permit. On April 6, Ogletree provided Lt. Smith with a bingo permit issued by the Indiana Secretary of State to the New Hope Missionary Baptist Church ("New Hope Church"). In addition, Ogletree gave Lt. Smith an Affidavit from Robert Gilbert, listed as a trustee of the New Hope Church, stating that Ogletree had been given permission to use that church's permit. Upon receiving this information, Lt. Smith began to investigate whether the New Hope Church was, in fact, a legitimate

---

F. Supp. 760, 767 (S.D. Ind. 1989), the Plaintiffs never explain how this or any of the other alleged misrepresentations might be material. Accordingly, these inconsistencies do not impact Lt. Smith's qualified immunity.

entity.[6] After this investigation, Lt. Smith concluded that the church did not meet Indiana's requirements for a bingo permit and obtained a warrant to search the Bingo Center in Richmond.

Dix appears to contend that Lt. Smith could not have had probable cause to support the search of the Bingo Center on April 8, 1992, because he had not conducted a thorough enough investigation of the New Hope Church prior to obtaining the warrant. Specifically, Dix contends that Lt. Smith should have checked the church's status with the Internal Revenue Service and with the Ohio Secretary of State.

This Court does not agree. The Seventh Circuit has noted that "once police officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence." Schertz v. Waupaca County, 875 F.2d 578, 583 (7th Cir. 1989). Based upon the information Lt. Smith uncovered in his

---

6

First, Lt. Smith went to the church's listed address in Dayton, Ohio, where he found the only building with that address was a commercial building containing only a dentist's office and' an accountant's office. Next, Lt. Smith telephoned the Indiana Secretary of State to verify the church's address. Another Richmond police officer, James Branum, traveled to the church's listed address in Dayton and discovered the accountant maintaining an office at that address was Gilbert. Gilbert gave Branum a different address for the church, but Branum did not find the church at that address, either. Gilbert then told Branum that they were sharing a church at a third address; however, Branum found only a vacant lot in this location. Lt. Smith also discovered that the articles of incorporation for the New Hope Church did not list Gilbert as a trustee. Additionally, when Ogletree first informed Lt. Smith that he was the operator of the Bingo Center, he identified himself as a trustee of Elks International Fraternity; however, under Indiana Code § 4-32-3-2, Elks International could not operate a game for another organization.

investigation, he reasonably concluded that the church did not meet Indiana's requirements for a bingo permit; therefore, he determined that the Bingo Center was operating without a valid permit. Because he reasonably believed the bingo game violated Indiana law, he had sufficient probable cause to support the warrant. No constitutional mandate required him to contact the Internal Revenue Service or the Ohio Secretary of State.[7]

Dix also suggests that his warrantless arrest violated constitutional standards. This Court finds no merit in this contention. According to the evidentiary materials, Lt. Smith arrested Dix based on his observations during the initial search of the Bingo Center on April 3. On that evening, Lt. Smith observed Dix counting money and making records regarding the night's bingo operations. This observation created probable cause sufficient to support Dix's warrantless arrest five days later.

Moreover, even if probable cause were found to be lacking for the search warrant or the warrantless arrest, Lt. Smith would still possess qualified immunity for his actions. Based upon the facts and law known to Lt. Smith at the time of these actions, he could reasonably have believed that probable cause existed. Therefore, this Court concludes that probable cause supported the search warrant and the warrantless arrest of Dix and that Lt. Smith possesses qualified immunity for his actions in regard to the search and the arrest.

2. FALSE ARREST AND FALSE IMPRISONMENT

Dix also contends that his arrest and incarceration constituted false arrest and false imprisonment under Indiana law. However, qualified immunity shields police officers from suit for damages if "a

---

[7] Interestingly, although Dix contends that Lt. Smith should have contacted these two entities, no evidence in the record presently before this Court reveals what Lt. Smith might have learned through such a continuance of his investigation.

reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed." Hunter v. Bryant, 502 U.S. 224, 227 (1991); Edwards v. Cabrera, 58 F.3d 290, 292 (7th Cir. 1995). As noted above, the evidentiary materials presently before this Court establish that probable cause existed to support Dix's arrest. Even if such probable cause did not exist, however, a reasonable officer could have believed that Dix's arrest would be lawful based upon Dix's actions on April 3. Therefore, this Court concludes that probable cause supported Dix's arrest and that Lt. Smith has qualified immunity for his actions in association with this arrest.[8]

3. DEFAMATION

In Count VI, Dix raises a claim for defamation against Smith and various other unidentified officers of the Police Department. Dix alleges that the officers made certain statements to a newspaper or to various newspapers regarding his arrest and that those statements imputed criminal activity to him and caused him harm.

Under Indiana law, the tort of defamation involves four elements: "(1) communication with defamatory imputation; (2) malice; (3) publication; and (4) damages." Schaefer v. Newton, 868 F. Supp. 246, (S.D. Ind. 1994), aff'd, 57 F.3d 1073 (7th Cir. 1995); Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 261 (Ind. 1994), reh. denied. In the present case, Dix's defamation claim cannot withstand Lt. Smith's

---

[8] Like Forman, Dix emphasizes that various inconsistencies exist between Lt. Smith's statements in his various testimony. However, Dix fares no better than Forman in explaining how the difference between a bingo license and a photocopy of a bingo license represents a "material misrepresentation." Accordingly, this Court finds no merit to Dix's claim that these inconsistencies defeat Lt. Smith's claim of qualified immunity.

Motion for Summary Judgment since Dix has not identified any defamatory statement. While Dix refers to newspaper articles in the Amended Complaint, he has only included one such article in the evidentiary materials. Exs. Attached to Pls. Resp. to Lt. Smith's Memo. in Supp. of Mot. for Summ. J. (hereinafter "Pls. Resp. Exs."). This article, dated Thursday, May 7, 1992, notes that the Indiana State Police had seized thirty-one gambling machines from seven Richmond area fraternal organizations and one local business the previous afternoon. The article goes on to identify the locations from which the machines had been seized and the value of the machines. The final paragraph of the article states: "On April 4, Richmond Police conducted a similar raid at Richmond Plaza Bingo, 1815 National Road W., and confiscated ten video poker and slot machines. The bingo hall was shut down for operating without a permit."

This article never mentions Dix. Although the Plaintiffs' Brief requests summary judgment on this issue, the Plaintiffs have not provided any evidence suggesting that Lt. Smith or any other Richmond police officer made a defamatory statement about Dix. Therefore, this Court believes that summary resolution of this claim in favor of Lt. Smith is appropriate at this time.

C. VANDERPOOL'S § 1983 CLAIMS AGAINST LT. SMITH

Like the other plaintiffs in this action, Vanderpool raises two separate challenges to his arrest. First, he asserts that the arrest violated various constitutional provisions; second, he contends that the arrest represented false arrest or false imprisonment. These claims may be treated simultaneously.

Unlike Forman and Dix, Vanderpool was arrested by Lt. Smith pursuant to an arrest warrant. On June 29, 1992, Lt. Smith signed an Affidavit of Probable Cause, attributing certain illegal actions to Vanderpool. This Affidavit contains a detailed discussion of the discovery of the gambling machines during the search of the Bingo Center on April 3, the operation of the machines, and Vanderpool's role

in supervising the use of the machines. On April 30, 1993, O'Maley filed this Affidavit of Probable Cause and an Information charging Vanderpool with two counts of professional gambling. On May 10, 1993, the Wayne County Court issued a warrant for Vanderpool's arrest, and Lt. Smith arrested Vanderpool on June 2. On May 9, 1994, however, O'Maley filed a motion to dismiss the charges against Vanderpool.

The subsequent decision to dismiss the gambling charges against Vanderpool does not impact the determination of whether probable cause existed for the initial arrest. Rather, this Court must ascertain whether "the facts and circumstances" within Lt. Smith's knowledge at the time of the arrest "were sufficient to warrant a prudent man in believing" that Vanderpool had violated the law. Hunter, 502 U.S. at 228; Edwards, 58 F.3d at 292. According to Lt. Smith's Affidavit, the investigation suggested that Vanderpool had not only supervised the customers' use of the machines but had also paid the customers their winnings. This evidence suffices to show that Lt. Smith had probable cause to arrest Vanderpool.

However, Vanderpool has also raised a challenge to the veracity of Lt. Smith's affidavit. In doing so, he bears a high burden, for courts award "great deference" to a magistrate's conclusion that a warrant should issue. United States v. Leon, 468 U.S. 897, 914 (1984). However, such deference "is not boundless," and a court may inquire "into the knowing or reckless falsity of the affidavit on which that determination was based." Id. In Franks v. Delaware, 438 U.S. 154, 155-56 (1978), the Supreme Court held:

> where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's

> false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the warrant must be voided . . . .

In asserting that Lt. Smith "knowingly and intentionally" included false statements in the Affidavit of Probable Cause, Vanderpool points to the same inconsistencies identified by Forman and Dix. Once again, Vanderpool emphasizes that Lt. Smith referred to the bingo license in one Affidavit of Probable Cause and the copy of the bingo license in another Affidavit of Probable Cause. Like the other Plaintiffs, however, Vanderpool fails to attribute any legal significance to this distinction. Vanderpool does not show that Lt. Smith made any misrepresentation "knowingly and intentionally, or with reckless disregard for the truth." Most importantly, however, Vanderpool does not show that the remainder of the Affidavit fails to establish probable cause. Even without any reference to the facts challenged by Vanderpool, it appears likely that the Court would still have issued the arrest warrant. Therefore, Vanderpool's challenge to the Affidavit of Probable Cause fails as a matter of law, and the finding of probable cause remains intact.

Since the Wayne County Court determined that probable cause supported Vanderpool's arrest, Lt. Smith did not violate the constitutional provisions by carrying out that arrest. Moreover, Vanderpool's arrest was neither false arrest nor false imprisonment. This Court also notes that, based upon the facts and law known to him at the time, Lt. Smith would also have possessed qualified immunity for his role in the arrest.

D. THE PLAINTIFF'S §1983 CLAIMS AGAINST THE POLICE DEPARTMENT

The three Plaintiffs have raised the same § 1983 claims against the Police Department that they raised against Lt. Smith. However, these claims against the Police Department cannot survive the present motion for summary judgment. First, it is questionable whether a plaintiff may properly assert a § 1983 claim against a city police

department. "A city's police department is merely a vehicle through which the city government fulfills its policy functions and is not a proper party defendant." Jones v. Bowman, 694 F. Supp. 538, 544 (N.D. Ind. 1988) ; Slay v. Marion County Sheriff's Dept., 603 N.E.2d 877, 887 (Ind. Ct. App. 1992).

Moreover, even if the Plaintiffs may pursue a §1983 action against a city police department, their claims cannot survive the present motion for summary judgment since they have failed to show that they suffered a deprivation of their constitutional rights as a result of some official policy or custom. As recently noted by this Court, to prevail in a § 1983 "against a municipality, a municipal officer in his or her official capacity. . . . or a municipal department or agency," a plaintiff must prove "that the constitutional deprivation was caused by enforcement or exercise of a municipal policy or custom." Blanton, 930 F. Supp. at 1198 (citations omitted). In other words, "a direct causal link" must exist between the "municipal policy or custom and the alleged constitutional deprivation." City of Canton v. Harris, 489 U.S. 378, 385 (1989). Moreover, the plaintiffs must submit evidence suggesting "that the claimed policy or custom actually exists, and that the alleged deprivation resulted from enforcement or pursuit of that policy--i.e., that the deprivation was not an 'isolated' incident." Blanton, 830 F. Supp. at 1202.

In the present case, the Plaintiffs have not shown any constitutional deprivation resulting from an official policy or custom. In responding to the Defendants' Motion for Summary Judgment, the Plaintiffs contend that "liability would flow from the policy and custom established concerning the selective enforcement of the gambling laws of the State of Indiana by the City of Richmond." Pls. Resp. to Lt. Smith's Memo. in Supp. of Mot. for Summ. J. ("Pls. Resp."), pp. 14-15. The Plaintiffs claim that the Police Department possessed information about other gambling in Richmond which was not "subject to the same enforcement efforts/levels." Pls. Resp., p. 15. They charge that the Police Department selectively enforced the gambling laws by prosecuting non-residents while tolerating local gambling. Pls. Resp., p. 15.

The Plaintiffs have offered no evidence to support these assertions. In fact, the Plaintiffs' own evidentiary materials undermine their theory of selective enforcement. According to the newspaper article appended to the Plaintiff's Response, Indiana State Police--assisted by eleven Richmond police officers--seized thirty-one gambling machines from seven Richmond area fraternal organizations and one local business on May 6, 1992. These seizures refute the Plaintiffs' claim that Lt. Smith and the Police Department singled them out for investigation and prosecution; rather, the Plaintiffs' own evidence suggests that the Police Department actively enforced the state's gambling laws and subjected known violators to similar enforcement efforts.

The Plaintiffs have not established that the Police Department pursued an official policy of selective enforcement against nonresidents; therefore, this Court awards summary judgment in favor of the Police Department on the Plaintiffs' § 1983 claims.

IV. THE PLAINTIFF'S § 1985 CLAIMS

The Plaintiffs have also stated claims against Lt. Smith and the Police Department under 42 U.S.C. § 1985; however, these claims also lack sufficient evidentiary support. As this Court recently noted, to prevail in an action under § 1985, a plaintiff must show

> (1)a conspiracy, (2) a purpose of depriving any person or class of persons of equal protection, or equal privileges and immunities, under the laws, (3) an act in furtherance of the conspiracy, (4) a resulting injury to person or property, or a deprivation of rights, and most importantly (5) a racial or otherwise class-based discriminatory animus.

Blanton, 830 F. Supp. at 1203 (citing Quinones v. Szorc, 771 F.2d 289, 291 & n.1 (7th Cir. 1985).

In the present case, the Plaintiffs have provided no evidence as to the fifth necessary element: "racial or otherwise class-based discriminatory animus." The Plaintiffs' Response notes that "the objects of the criminal prosecutions were all associated with the Richmond Plaza Bingo, where Ogletree and Dix were dark skinned/resident(s) of the

State of Ohio, Forman was a non-resident of Delaware County, and Vanderpool was a resident of Wayne County, associated with the Bingo Center." Pls. Resp., p. 17. The differing races of the three Plaintiffs defeats any claim that Lt. Smith or the Police Department discriminated against the Plaintiffs based upon their race. Further, the Plaintiffs have not provided adequate evidence to suggest that they were discriminated against because they were non-residents of Richmond.[9] Therefore, this Court concludes that the Plaintiffs have not made an adequate showing on the fifth required element of a claim under § 1985.[10] Therefore, this Court believes summary judgment may appropriately be awarded in favor of Lt. Smith and the Police Department on the Plaintiffs' § 1985 claims.

V. THE JOHN DOE DEFENDANTS

In addition to the named Defendants, the Plaintiffs have brought claims against fifty John Doe Defendants. According to the Amended Complaint, these Defendants "are police officers with the City of Richmond Police Department in and around April, 1992, and thereafter,

---

9

In discussing the Plaintiffs' §1983 claim against the Police Department, this Court noted that the Plaintiffs submitted a newspaper article which mentioned that Indiana State Police Officers and Richmond Police Officers seized thirty-one gambling machines from seven Richmond area fraternal organizations and one local business on May 6, 1992. This further undermines the Plaintiffs' suggestion that the Police Department and Lt. Smith conspired against them based upon their state or county of residence.

10

This Court makes no finding as to whether the Plaintiffs have provided adequate evidence of the remaining four elements of a § 1985 claim.

and other persons whose names and actions are currently unknown to the Plaintiffs' at this time, and the Plaintiffs' will amend the complaint to name the person(s) and their actions when fully ascertained." Amended Complaint, 12. Although the Plaintiffs filed their Amended Complaint on July 5, 1994, these John Doe Defendants still have not been identified.

As noted by the Seventh Circuit, "[a] cause of action under 1983 for an improper arrest or search accrues at the time of the arrest or search." Perez v. Sifel, 57 F.3d 503, 505 (7th Cir. 1995). Moreover, "the two year Indiana statute of limitations for personal injuries (Ind. Code § 34-1-2-2) applies to § 1983 claims." Although a plaintiff may file a complaint against a John Doe Defendant, the plaintiff must identify that defendant within the limitations period; otherwise, any amendment of the complaint to name the individual would not be timely unless the amendment related back or the statute of limitations had been tolled. Worthington v. Wilson, 8 F. 3d 1253, 1255 (7th Cir. 1993); Perri v. Daggy, 776 F. Supp. 1345, 1349 (N.D. Ind. 1991). In the present case, the most recent event challenged by the Plaintiffs is Vanderpool's arrest, which occurred on June 2, 1993. Accordingly, statute of limitations expired--at the latest--in June of 1995. Because the Plaintiffs failed to identify the John Doe Defendants within the applicable two-year period, their claim against these Defendants is time barred.

Also, while the Amended Complaint does mention "other persons whose names and actions are currently unknown," the Amended Complaint only mentions the actions of unidentified police officers. In discussing the Claims against Lt. Smith, this Court noted that government officials possess qualified immunity if "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. The facts and law in the present case supported the search of the Bingo Center and the arrests of Forman, Dix, and Vanderpool. Presumably, any other officers involved in the search or the arrest of these three individuals would receive the same qualified immunity as Lt. Smith.

This Court recognizes that a district judge may grant summary judgment in favor of a party which has not requested it. Hunger v.

Leininger, 15 F.3d 664, 669 (7th Cir.), cert. denied, 115 S.Ct. 123 (1994); Resolution Trust Corp. v. Ruggiero, 994 F.2d 1221, 1226 (7th Cir. 1993). Based upon the expiration of the limitations period and the existence of qualified immunity, this Court believes summary resolution in favor of the John Doe Defendants is appropriate at this time.

CONCLUSION

For the reasons stated above, this Court now GRANTS the Motion for Summary Judgment filed by Lt. Smith and the Police Department on all Counts of the Plaintiffs' Complaint. Also, this Court DENIES the Motion for Summary Judgment filed by the Plaintiffs. Finally, this Court GRANTS Summary Judgment in favor of the unidentified John Doe Defendants.

IT IS SO ORDERED this 1st day of April, 1996.

LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

App. "B"

No. 89SOl - 9508 - CR -979

STATE of Indiana,
Appellant,

v.

Marc FOREMAN, a/k/a Marc Forman,
Appellee.

Supreme Court of Indiana.
March 11, 1996.

Defendant was charged with professional gambling and the Wayne Circuit Court, Douglas Van Middlesworth, J., granted defendant's motion to suppress evidence and then granted State's motion to dismiss. State appealed order on motion to suppress. The Court of Appeals, Najam, J., reversed. Transfer was granted. The Supreme Court, Sullivan, J., held that: (1) belief that third party had common authority over leased premises was unreasonable; (2) there was no evidence that third party consented to search of locked room; (3) defendant had subjective expectation of privacy in room; and (4) expectation of privacy was reasonable.

Affirmed.
Opinion, 649 N.E.2d 120, vacated.

Appeal from the Wayne Circuit Court; The Honorable Douglas Van Middlesworth, Judge, Cause No. 89COl-9304-CR-47.

Pamela Carter, Attorney General, Geoff Davis, Deputy Attorney General, Indianapolis, for Appellant.

Thomas D. Margolis, Muncie, for Appellee.

ON PETITION TO TRANSFER

SULLIVAN, Justice.

Facts

Defendant Marc Foreman, a.k.a. Marc Forman, leased a room at the Richmond Plaza Bingo Center in Richmond, Indiana, from Luther Ogletree, the operator and manager of the bingo hall.

On April 3, 1992, after receiving a report that unauthorized bingo games were being conducted at the bingo center, investigator Mark Smith with the Special Unit of the Richmond Police Department went to the bingo center to see if it was operating under a proper gambling permit. Upon his arrival to the bingo center, Smith observed several hundred people playing bingo. Smith also learned that there was no proper permit for the bingo games and subsequently ordered the games to cease.

While Smith was at the bingo center, Ogletree identified himself to Smith as the operator of the bingo center and the leaseholder on and lessor of the premises, and then gave Smith written consent to search the premises. During the search of the premises, Smith and assisting officers encountered a locked door. The officers removed the door from its hinges and entered the room behind the door. Inside the room the officers found ten video gambling machines with stools in front of them. Ogletree told Smith the machines were not his and that he was renting the room to defendant. The door to the room was generally left open during bingo games to allow access to patrons of the bingo hall.

On April 30, 1993, Foreman was charged with two counts of professional gambling, both Class D felonies.[1] In response, Foreman filed a motion to suppress and a motion to dismiss, claiming that

---

1 Ind.Code § 35-45-5-3(3) and (6).

Ogletree's consent to search was invalid as to the room leased by him. The trial court granted Foreman's motion to suppress and in doing so stated:

> The argument that the police believed they had valid consent to search the premises would be more persuasive had they asked the presumed consenting party to unlock the door rather than taking the door off its hinges to gain entry....The requirement of a search warrant is intended to protect all from unreasonable searches. The present case highlights the importance of obtaining a warrant when possible. In the present case, first hand information concerning the activities, in the subject room was obtainable with a minimal police investigation. The police already suspected illegal gaming in the room, having received several tips. There were numerous customers and workers at the Bingo Plaza that had access to the room and were familiar with the activities therein. An undercover agent could have obtained access with little apparent difficulty. The prudent steps of obtaining a warrant would have prevented the illegal search problem.

Thereafter, the State filed a motion to dismiss, which the trial court later granted. The State then appealed the trial court's granting of Foreman's motion to suppress, claiming that the search was valid. The Court of Appeals agreed and reversed the trial court. Indiana v. Foreman, 649 N.E.2d 120, 125 (Ind.Ct.App.1995). Judge Baker dissented and agreed with the trial court that valid consent had not been obtained in this case and that therefore a warrant was necessary. Id. Foreman seeks review of the Court of Appeals decision and we granted transfer on August 17, 1995.

Discussion

Foreman maintains that the trial court was correct in granting his motion to suppress, because the State's warrantless search of the room he leased at the bingo center constituted a violation of his Fourth

Amendment rights.[2] The State asserts, and the Court of Appeals agreed, that there was no Fourth Amendment violation since the police conducted the search with the consent of Ogletree, whom the police reasonably believed to have authority over the premises searched.

Under the Fourth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, all searches of private property must be reasonable. U.S. Const. amend. IV; Fair v. State, 627 N.E.2d 427, 430 (Ind.1993). "A warrantless search is presumed to be unreasonable, and the State bears the burden to show that the search falls under an exception to the warrant requirement." Smith v. State, 565 N.E.2d 1059, 1060 (Ind.1991) (citing Brooks v. State, 497 N.E.2d 210 (Ind.1986)). The validity of a warrantless search turns upon the facts of each case. Savage v. State, 523 N.E.2d 758, 760 (Ind. 1988).

As the Court of Appeals correctly pointed out, "a valid consent to search obviates the necessity of a warrant." 649 N.E.2d at 123 (citing Stallings v. State, 508 N.E.2d 550, 552 (Ind.1987)). Consent to search may be granted by a third party who has common control over the premises searched. United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). To establish common authority, the State must show that the third party had joint access or control over the premises. Id. at 171 n. 7, 94 S.Ct. at 993 n. 7.

In this case, the Court of Appeals declined to determine whether or not Ogletree had common authority over the leased premises, because even where a third party does not actually have common control over the premises, if the police at the time of the entry reasonably believed that

---

2

The Fourth Amendment to the U.S. Constitution reads, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

the third party had common control over the premises, the warrantless entry may be valid. Illinois v. Rodriguez, 497 U.S. 177, 179, 110 S.Ct. 2793, 2796-2797, 111 L.Ed.2d 148 (1990). The Court of Appeals applied the Rodriguez analysis to the facts of this case and concluded that the police officers reasonably believed that Ogletree had common authority over the leased premises. In so concluding, the Court of Appeals relied on the facts that Ogletree informed the police that he was the operator of the bingo game and the leaseholder on the premises, that Ogletree gave permission to search the Richmond Plaza Bingo Hall, and that the officers did not find out that Foreman leased the room until after the search was conducted. 649 N.E.2d at 125.

We do not find the Court of Appeal's analysis convincing for several reasons. First, in light of the fact that the police officers took the door off of its hinges to gain access to the room instead of merely asking Ogletree to unlock the door, the evidence is at least conflicting that the officers reasonably believed that Ogletree had common authority over the leased premises. Second, and more importantly, we believe that even if the officers had reasonably believed that Ogletree had common authority over the leased premises, we find no evidence that Ogletree consented to the search of the locked room. It is irrelevant whether or not the officers thought Ogletree had common authority over the leased premises if it is not first clear that he actually consented to a search of the leased premises. Rodriguez, 497 U.S. at 177, 110 S.Ct. at 2795 (third party clearly consented to search first). As the trial court said, "The argument that the police believed they had valid consent to search the premises would be more persuasive had they asked the presumed consenting party to unlock the door rather than taking the door off its hinges to gain entry." (emphasis added).

We agree with the trial court that had the police reasonably believed that Ogletree gave permission to search the room, the police simply would have asked Ogletree to unlock the door. Instead, the police took the door off its hinges to gain access to the room. We acknowledge that Ogletree had signed a written consent permitting a search of the Richmond Plaza Bingo Hall, without any explicit exclusion of the locked room. However, we cannot reconcile that fact with the inconsistent behavior of the police in removing the door off the hinges when Ogletree

was standing right there and could have easily provided a key to unlock the door. We conclude there was sufficient evidence that Ogletree did not validly consent to a search of the leased premises to support the trial court's grant of the motion to suppress.[3]

"[A] Fourth Amendment violation must establish (i) that the defendant had an actual or subjective expectation of privacy and (ii) that the claimed expectation must be one which society recognizes as reasonable." Blalock v. State, 483 N.E.2d 439, 441 (Ind. 1985) (citing Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979) and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). This two prong test was initially espoused in Justice Harlan's well known concurrence in Katz and has come to play a vital role in Fourth Amendment jurisprudence.

A

The first prong of the test requires a determination that the defendant held an actual, subjective expectation of privacy in the area searched. Katz, 389 U.S. at 361, 88 S.Ct. at 516-17. In making this determination, courts have historically looked to the steps that the defendant took to preserve his or her privacy. See California v. Ciraolo, 476 U.S. 207, 106 S.Ct. 1809, 90 L.Ed.2d 210 (1986) (A ten foot fence placed by the defendant around his yard was evidence that he took precautions to maintain his privacy, at least with respect to street level viewers.); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (By taking steps to place his personal effects in a locked footlocker, the defendant manifested an expectation of privacy.); Katz, 389 U.S. at 351-52, 88 S.Ct. at 511 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of

---

3

The State also argues that even if valid consent was not given, the defendant did not have a legitimate expectation of privacy in the area searched and that therefore the search did not violate the defendant's Fourth Amendment rights.

the Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.") (emphasis added); and United States v. Burnett, 890 F.2d 1233, 1239 (D.C.Cir.1989) (In determining that defendant did not have a reasonable expectation of privacy, court focused on steps not taken to preserve privacy. "Had Burnett's subjective expectation of privacy been more pronounced, he would, presumably, have closed the door to the bedroom in which he was staying...." (emphasis added).

The State argues that the defendant took no precautions to maintain privacy because the room he leased was open to the public. Although it is true that the room was open to the general public during business hours, at the time that the officers encountered it, the room was no longer open to the public. Sometime before encountering the locked door, the police had ordered the games to cease, which thereafter effectively closed the center. One of the employees had then closed and locked the door to the leased room, cutting off access at that point to the general public.

In this, case, we acknowledge that had the officers entered the room while the door was open and the rest of the public had access, the defendant likely would not have had an expectation of privacy at that time. See Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985) (There is no reasonable expectation of privacy in an area that is open to the public.) But that is not what happened here--as demonstrated by the fact that the police could only gain access by removing the doors from its hinges while it was closed and locked.

Furthermore, it has been held that in order to claim a defendant did not have an expectation of privacy in premises that were open to the public, the officers must have viewed incriminating evidence as regular customers would. "[G]overnment agents cannot attempt to justify a warrantless search on a claim of reduced expectation of privacy on business premises when the agents do not see the items as a customer would ordinarily see them." United States v. Swart, 679 F.2d 698, 701 (7th Cir.1982) (citing Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979)). Since the officers had to

remove the door from its hinges, it is clear that the officers did not enter the premises as regular customers during business hours would.

In addition, we agree with the Court of Appeals that the mere fact that Ogletree and a few other entrusted persons had a key to the premises did not negate defendant's reasonable expectation of privacy.[4] The fact that other employees or entrusted people have a key to one's office does not defeat that person's expectation of privacy in his or her commercial premises. United States v. Taketa, 923 F.2d 665, 673 (9th Cir.1991) ("[A]llowing the existence of a master key to overcome the expectation of privacy would defeat the legitimate privacy interest of any hotel, office, or apartment complex....Privacy does not require solitude.").

When the doors were closed and locked and access to the general public cut off, a measure was taken to maintain privacy with respect to that room. In light of this effort, we believe the defendant had a subjective expectation of privacy at least during the times that the door was closed and locked and general public access denied.

B

This does not end our inquiry, however, as we must further determine whether Foreman's expectation of privacy in this case is one that society would recognize as reasonable. Katz, 389 U.S. at 361, 88 S.Ct. at 516-17.

---

[4] Given the Court of Appeals' disposition of this case, it found it unnecessary to decide whether Foreman had a reasonable expectation of privacy in the locked room. The Court of Appeals did observe, however, that it agreed with the trial court that lessor's mere limited right to enter the room and possession of a key do not overcome the defendant's expectation of privacy in the leased room. 649 N.E.2d at 124 n. 3.

Although the expectation of privacy with regard to commercial premises is less than the expectation of privacy with regard to private homes, New York v. Burger, 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987),[5] the United States Supreme Court has established that the Fourth Amendment prohibition against unreasonable searches does apply to commercial businesses. Marshall v. Barlow's, Inc., 436 U.S. 307, 311, 98 S.Ct.1816, 1819-20, 56 L.Ed.2d 305 (1978)("The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that amendment, and the importance of the American colonial experience.") As we discussed in part II-A, supra, an expectation of privacy in business premises while general public access is available is not likely to be considered reasonable, at least as long as the officers view items as ordinary customers would. See Macon, 472 U.S. 463, 105 S.Ct. 2778, and Swart, 679 F.2d 698. However, in a case such as this one, where the general public no longer had access to the room and the door was closed and locked, we believe society would recognize defendant's expectation of privacy as reasonable. Simply because one allows general access to a facility during certain times, does not mean that person has forgone any expectation of privacy with respect to that facility during times he or she wishes to exclude others. In fact, we are hard pressed to think of a situation where our society would be more likely to recognize that a commercial establishment's expectation of privacy is reasonable than when the doors have been closed and locked and business hours are over. Finally, we believe this conclusion is consistent with the United States Supreme Court's recognition of what it called "our society's historical understanding that owners of such [commercial] property have a legitimate interest in being free from unnecessary government inspections." Marshall, 436 U.S. at 311-313, 98 S.Ct. at 1819-1821.

5

"An expectation of privacy in commercial premises ... is less than a similar expectation in an individual's home." Burger, 482 U.S. at 699, 107 S.Ct. at 2642 (citing Donovan v. Dewey, 452 U.S. 594, 598-99, 101 S.Ct. 2534, 2538, 69 L.Ed.2d 262 (1981)).

Conclusion

Because the defendant had a reasonable expectation of privacy in the leased room, there was no valid consent to search the premises, and no other valid exception to the warrant requirement was claimed, the warrantless search of the leased premises was unconstitutional and the trial court's motion to suppress was appropriate.

Therefore, we vacate the decision of the Court of Appeals and affirm the trial court's grant of defendant Foreman's motion to suppress.

SHEPARD, C.J., and DEBRULER, DICKSON and SELBY, JJ., concur.

App. "C"

Amendment IV
United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

App. "D"

Amendment XIV
United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice president of the United States, Representatives in Congress, the Executive or Judicial officers of a State, or the members of Legislatures thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or representative of Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions or

bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid or insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

App. "E"

42 U.S.C. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.